

in accordance with the instructions thereto.

Appendix to Part 2617—Agreement for Commitment to Make Plan Sufficient for Benefit Liabilities

This agreement, by and between [name of company] (the "Company") and [name of plan] (the "Plan") shall be effective as of the last date executed.

Whereas, the Plan is an employee pension benefit plan as described in section 3(2)(A) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. 1001-1461; and

Whereas the Company is [describe entity, e.g., corporation, partnership]; and

Whereas, the Company is a contributing sponsor of the Plan, or a member of the contributing sponsor's controlled group, as described in section 4001(a) (13) and (14) of ERISA, 29 U.S.C. 1301(2) (13) and (14); and

Whereas, the Plan is covered by the termination insurance provisions of Title IV of ERISA, 29 U.S.C. 1301-1461; and

Whereas, the Plan administrator has issued or intends to issue to each affected party a notice of intent to terminate the Plan, pursuant to section 4041(a)(2) of ERISA, 29 U.S.C. 1341(a)(2); and

Whereas, the Company wishes the Plan to be sufficient for benefit liabilities, as

described in section 4001(a)(16) of ERISA, 29 U.S.C. 1301(a)(16); and

Whereas, the parties understand that if the Plan is not able to satisfy all its obligations for benefit liabilities, it will not be able to terminate in a standard termination under section 4041(b) of ERISA, 29 U.S.C. 1341(b); and

Whereas, the Company is not a debtor in a bankruptcy or other insolvency proceeding.

[Alternative Paragraph]

Whereas, the Company is a debtor in a bankruptcy or other insolvency proceeding and the court before which the proceeding is pending approves this commitment.

Whereas, the Company is a debtor in a bankruptcy or other insolvency proceeding and this commitment is unconditionally guaranteed, by an entity or person not in bankruptcy, to be met at or before the time distribution is required in this standard termination.

Now Therefore, the parties hereto agree as follows:

1. The Company promises to pay to the Plan, on or before the date prescribed for distribution of Plan assets by the plan administrator, the amount necessary, if any, to ensure that, on the date the plan administrator distributes the assets of the

Plan, the Plan is able to provide all benefit liabilities.

2. For the sole purpose of determining whether the Plan is sufficient to provide all benefit liabilities, an amount equal to the amount described in paragraph 1 shall be deemed a Plan asset available for allocation among the participants and beneficiaries of the Plan, in accordance with section 4044 of ERISA, 29 U.S.C. 1344.

3. This Agreement shall in no way relieve the Company of its obligations to pay contributions under the Plan.

Date: _____
By: _____
Company: _____
By: _____
Plan: _____

Issued in Washington, D.C. this 7th day of December, 1992.

Lynn Martin,

Chairman, Board of Directors Pension Benefit Guaranty Corporation.

Issued on the date set forth above pursuant to a resolution of the Board of Directors authorizing its Chairman to issue this final rule.

Carol Connor Flowe,

Secretary, Board of Directors, Pension Benefit Guaranty Corporation.

[FR Doc. 92-30057 Filed 12-11-92; 8:45 am]

BILLING CODE 7706-01-M

Federal Register

Monday
December 14, 1992

Part III

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and
Plants; Karner Blue Butterfly and Five
Aquatic Snails in South Central Idaho;
Final Rules

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018-AB75

Endangered and Threatened Wildlife and Plants; Determination of Endangered Status for the Karner Blue Butterfly

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final Rule.

SUMMARY: The U.S. Fish and Wildlife Service determines the Karner blue butterfly (*Lycaeides melissa samuelis*) to be an endangered species pursuant to the Endangered Species Act of 1973 (Act), as amended. Historically, the Karner blue butterfly occurred in a rather narrow band extending from eastern Minnesota, across portions of Wisconsin, Illinois, Indiana, Michigan, Ohio, Canada (Ontario), Pennsylvania, New York, Massachusetts, and New Hampshire. It is now extirpated from Ohio, Pennsylvania, and Massachusetts, and is considered virtually extirpated from Ontario. This action is being taken because of constriction of the species' range and the declining size of remaining populations. The primary cause of past and threatened losses is habitat modification and destruction due to development, succession in the absence of natural disturbances, silviculture, and fragmentation of remaining habitat. This listing extends the Federal protection and recovery provisions afforded by the Act to *Lycaeides melissa samuelis*.

EFFECTIVE DATE: December 14, 1992.

ADDRESSES: The complete file for this rule is available for inspection, by appointment, during normal business hours at the New York Field Office, U.S. Fish and Wildlife Service, 3817 Luker Road, Cortland, New York 13045.

FOR FURTHER INFORMATION CONTACT: Mark W. Clough at the above address, telephone (607) 753-9334.

SUPPLEMENTARY INFORMATION:**Background**

The Karner blue butterfly has been known for more than a century. When W.H. Edwards first described this butterfly in 1861 in Karner, New York, it was considered to belong to the same species as the Scudder's blue. In the 1940's, Nabokov revised the taxonomy of the group and renamed the Karner blue as a subspecies of the more common *Melissa* blue. The current scientific name is *Lycaeides melissa*

samuelis, Nabokov. Some lepidopterists consider the Karner blue butterfly to be a separate species (D. Schweitzer, The Nature Conservancy, *in litt.*, 1987). However, this change has not been published and the Karner blue butterfly will be considered a subspecies for the purposes of listing.

Karner blues have a wingspan of 22–32 mm (0.87–1.26 in.). The dorsal side of the male is silvery blue or dark blue with narrow black margins. The females are grayish brown dorsally, with irregular bands of orange inside the narrow black border on the upper wings. Both sexes are slate gray on the ventral side with the orange bands showing more regularity, and black spots circled with white (Shull 1987).

The habitat of the Karner blue butterfly is characterized by the presence of wild lupine (*Lupinus perennis*), a member of the pea family. Wild lupine is the only known larval food plant for the Karner blue butterfly and is, therefore, closely tied to the butterfly's ecology and distribution. In eastern New York and New Hampshire, the habitat typically includes sandplain communities, and grassy openings within very dry, sandy pitch pine/scrub oak barrens. In the Midwest, the habitat is also dry and sandy, including oak savanna and jack pine areas, and dune/sandplain communities. It is believed that the Karner blue butterfly originally occurred as shifting clusters of populations, or metapopulations, across a vast fire-swept landscape covering thousands of acres. While the fires resulted in localized extirpation, post-fire vegetational succession promoted colonization and rapid population buildups (Schweitzer 1989). Periodic disturbance is necessary to maintain openings in the canopy for wild lupine to thrive. A variety of other understory plants associated with the habitat serve as nectar sources for the adult butterflies.

The Karner blue butterfly usually has two broods each year. Eggs that have overwintered from the previous year hatch in April. The larvae feed on wild lupine leaves and mature rapidly. Near the end of May, they pupate and adult butterflies emerge very late in May in most years. The adults are typically in flight for the first 10 to 15 days of June, when the wild lupine is in bloom. Females lay eggs on or near the wild lupine plants. The eggs hatch in about one week and the larvae feed for about three weeks. They then pupate and the second brood adults appear in the second or third week of July. This time, the eggs are laid among plant litter or on grass blades at the base of the lupines, or on lupine pods or stems. By early

August, no adults remain, and these eggs do not hatch until the following spring (Schweitzer 1989, Dirig 1979).

The distribution of the Karner blue butterfly is very discontinuous and generally follows the northern limits of wild lupine. Eight major population clusters of the Karner blue butterfly were known historically from portions of Wisconsin, Michigan, Minnesota, Indiana, Illinois, Ohio, Massachusetts, New Hampshire, Pennsylvania, New York, and Ontario. Over the past 100 years, Karner blue butterfly numbers have apparently declined rangewide by 99 percent or more. Over 90 percent of the decline occurred in the last 10 to 15 years. It is now extirpated from Massachusetts, Pennsylvania, and Ohio (Schweitzer 1989; *in litt.*, 1990). Unconfirmed reports indicate that one or two Karner blues may have been sighted at an historic Ontario site in 1990 or 1991.

The New York Natural Heritage Program maintains a state list of approximately 50 individual Karner blue butterfly sites, comprising about ten site-clusters, all found in the area known as the Albany Pine Bush and at scattered locations extending about 40 miles to the north. Once the site of a massive Karner blue population, the Albany Pine Bush is the locality from which the Karner blue butterfly was first scientifically described. There are also unverified records of Karner blues in Manhattan and Brooklyn from the mid 1800's. Givnish *et al.* (1988) noted a decline of Karner blue butterflies in the Albany Pine Bush of 85 to 98 percent over the past decade, exclusive of one site that has remained stable. Givnish *et al.* (1988) and Schweitzer (1990) described the decline in the Pine Bush population as dropping from numbers of around 80,000 in 1979, to around 1,000 in 1987, to 100–200 in 1990. North of the Albany Pine Bush, one disturbed site located at an airport has persisted with numbers estimated around 14,000 in 1990. This population is several times larger than all the other New York sites combined (Schweitzer 1990). The majority of extant Karner blue sites in New York are in municipal and private ownership. Other landowners include a State Park, The Nature Conservancy, and Saratoga County.

In New Hampshire, the Concord Pine Barrens along the Merrimack River support the only remaining occurrence of the Karner blue butterfly in New England. The sole population is extremely low in numbers and occurs on a privately owned, two to three acre site within a power line right-of-way bordering an industrial park, and on the grounds of a nearby airport. The results

of 1990 surveys reported by The Nature Conservancy (1990) showed a decline in the population size from an estimated 2,000 to 3,000 individuals in 1983 to an estimated 250 to 400 individuals in 1990. During that survey, Karner blue butterflies were not found at two other sites in the Concord Pine Barrens where the subspecies had been documented in 1983.

In Wisconsin, 33 of 36 historical occurrence sites were surveyed during 1990. Survey results reported by Bleser (1990) revealed that Karner blue butterflies were found at only 11 of the 33 historical sites visited. Although 23 previously unknown populations were discovered, Bleser noted that numbers of Karner blue butterflies observed were very small at most sites. Only three sites had 50 or more individuals observed, with none greater than 100. While these surveys did not provide a basis for statements of actual population size, they all appeared to be small, and many might not be considered viable. Many of the remnant populations in Wisconsin are also widely scattered, occurring in isolated patches of habitat along roadsides, power line clearings, and on abandoned agricultural fields. Additional surveys conducted in 1991 revealed a total of 131 discrete lupine areas that support Karner blue butterflies (Besadny *in litt.*, 1992). During the 1991 surveys, ten or fewer adults were counted at 53 percent of the 131 discrete sites, 11–50 adults were counted at 29 percent of the sites, 51–100 adults were counted at 10 percent of the sites, 101–300 at only seven percent of the sites, and over 300 at just one percent of the sites. It should be noted that actual population sizes may be 3 to 6 times, or higher, than the numbers of butterflies counted on a given site visit. At least half of Wisconsin's remaining Karner blue butterfly populations are small, isolated, and cannot be considered secure or viable in the long term. However, "a very good number of quite sizable populations occur on publicly owned properties offering good opportunities for long-term protection and management" (Besadny *in litt.*, 1992). Over three fourths of the Wisconsin sites are on publicly administered lands, including Necedah National Wildlife Refuge, Department of Defense, Wisconsin Department of Natural Resources, and County Forest. Other sites are owned or partly owned by other state and county governmental agencies, private landowners, and utility companies.

The Karner blue butterfly has declined throughout its range in Michigan. It still occurs in six of seven

counties from which it was known historically, but the existing populations are greatly reduced and have become highly fragmented within expanses of unsuitable habitat (Wilsman 1990). The Michigan Natural Features Inventory includes over two dozen historical locations for the Karner blue butterfly. Five of these no longer support populations of Karner blue butterflies, and many of the remainder are ranked as poor quality sites. Considering the population dynamics of the species, it can be expected that many individual sites which once supported populations of Karner blue butterflies are no longer suitable. Although information on exact historical locations is lacking, many general areas reported to have Karner blue butterflies in the 1950's have become unsuitable due to succession or conversion to plantations (L. Wilsman, Michigan Department of Natural Resources, pers. comm., 1991). In his critique of 1989 population studies done by W. S. Lawrence and A. C. Cook in the Allegan State Game Area, Michigan's only remaining sizable population, Schweitzer (*in litt.*, 1989) noted that the results indicate a decline to fragmented remnants with dangerously low numbers, which is characteristic of a collapsing Karner blue butterfly population. Other Michigan sites occur on the Manistee National Forest (intermixed with private inholdings), on power company rights-of-way, and on other private lands.

The results of surveys during 1990 in Indiana were summarized by C. Hedge (Indiana Department of Natural Resources, pers. comm., 1991). Karner blue butterflies were reconfirmed at one known site, and they were also rediscovered on three of seven historical sites. Searches at 27 sites identified as potentially suitable for the species yielded six new locations for the species. However, all extant sites in Indiana are in two population clusters within two counties. Six sites are located on Indiana Dunes National Lakeshore, and other landowners include a county park and recreation department, a school district, and The Nature Conservancy. Shull (1987) indicated eight Indiana counties in the historic range of the Karner blue, although some of these records are based on sightings that are not supported with voucher specimens. The species is no longer found at one area where Shull reported observing dozens of individuals in 1980.

Cuthrell (1990) reported the results of 1990 surveys conducted in Minnesota. During the 1990 surveys of 50 potentially suitable sites, two areas with

Karner blue butterflies were located. Both sites are on a State Wildlife Management Area, in the vicinity of one of the historical locations. Karner blue butterflies were not found at the other historical site. Studies conducted during 1991 revealed three new sites within one half to three miles of the sites surveyed in 1990 (Lane 1992a). Lane reported low numbers of individuals observed at all five sites, with none greater than 14, indicating extremely small populations.

The Karner blue butterfly was presumed extirpated from Illinois until the species was relocated there in August 1992. A total of seven butterflies, including five males and two females, were reported from a lupine site in the northern part of the State (S. Lauzon, Illinois Endangered Species Protection Board, pers. comm., 1992). The Karner blue was previously known from one collection in Illinois. This record consists of two specimens from the Andreas Bolter collection, labelled "N. 111." (Irwin and Downey 1973), which suggests that they were collected around or before 1900.

Karner blues frequently occur with other rare butterfly species such as the persius duskywing (*Erynnis persius*) and the frosted elfin (*Incisalia irus*), which are being listed by states where they occur (D. Schweitzer, pers. comm., 1991). Wild lupine is also the host plant for these species in parts of their range.

The Karner blue butterfly was first recognized by the Federal government in the Federal Register Notice of Review published on May 22, 1984 (49 FR 21664). That notice, which covered invertebrate wildlife under consideration for endangered or threatened status, included the Karner blue butterfly as a Category 2 species. Category 2 includes those taxa for which proposing to list as endangered or threatened is possibly appropriate, but for which substantial data on biological vulnerability and threats are not currently available to support proposed rules. In the Federal Register Animal Notice of Review published on January 6, 1989 (54 FR 554), the Karner blue butterfly was retained as a Category 2 species. Although the decline of the Karner blue butterfly in the Northeast was documented during the 1980's, it was believed that populations in the Midwest were relatively secure, particularly in Wisconsin and Michigan. Surveys conducted during 1989 and 1990 in the Midwest revealed that the butterfly is in decline there also. The Animal Notice of Review published in the November 21, 1991 Federal Register included the Karner blue butterfly as a Category 1 species, indicating that the

Service possessed sufficient information to support a proposal to list this butterfly. On January 21, 1992 (57 FR 2241), the Service published a proposed rule to list the Karner blue butterfly as an endangered species.

Summary of Comments and Recommendations

In the January 21, 1992, proposed rule and associated notifications, all interested parties were requested to submit factual reports or information that might contribute to the development of a final rule. Appropriate State agencies, county governments, Federal agencies, scientific organizations, major landowners, and other interested parties were contacted and requested to comment. Notices were published in newspapers of general circulation in each area where the Karner blue butterfly is known to occur. On March 4, 1992, the Service received a request for a public hearing from Dr. Wilmer Pautz of the University of Wisconsin-Eau Claire. Accordingly, on June 8, 1992, the Service published a notice in the *Federal Register* extending the comment period to July 6, 1992, and announcing a public hearing to be held in Eau Claire, Wisconsin on June 25, 1992. At the hearing the public was invited to present oral or written information to be entered into the record, on factors pertinent to the proposed listing of the Karner blue butterfly. Mrs. Maud Kelley, a local resident, and Dr. Wilmer Pautz, representing various citizens in Eau Claire County, presented the only oral statements, and no additional written statements were submitted at the public hearing.

A total of 112 written comments on the proposed listing were received by the Service. Comments supporting the listing were received from the Ohio, Indiana, Wisconsin, and Minnesota Departments of Natural Resources, the New Hampshire Fish and Game Department, and the New York State Department of Environmental Conservation. Comments supporting the listing were also received from six professional or amateur lepidopterists and butterfly researchers, and eight private conservation organizations. A total of 91 comment letters were received from private citizens; 87, including 66 from elementary school students, expressed support for listing the Karner blue butterfly. The remaining four comments from private citizens include the comment letter from Dr. Pautz requesting the public hearing and also requesting that listing be delayed for three years, two commenters that did not take a position on the listing, and

one commenter who expressed opposition to proposed listing. A comment letter from the Newaygo County, Michigan Board of Commissioners expressed conditional support for the listing, if it would not interfere with the gypsy moth eradication program.

Many of the commenters provided general information or observations about the Karner blue butterfly, and additional scientific or factual information. Several commenters offered suggestions or recommendations for future protection, research, management, and recovery efforts, or offered to assist the Service in these areas. The Service will consider those suggestions and recommendations, and will continue to work with all interested parties in future efforts to protect and recover this species. Comments updating the data presented in the "Background" or "Summary of Factors Affecting the Species" are incorporated in those sections of this final rule. The Service's responses to the comments and issues raised at the public hearing and in the written comments follow.

Issue 1. The one comment received that opposed the listing of the Karner blue butterfly stated that development might be impacted, forests would be destroyed, and questioned the Karner blue butterfly's contribution to society.

The Service responds that under section 4(b)(1)(A) of the Act, a listing determination must be based solely on the best scientific and commercial data available. The first decision to list a species is based on biological criteria defined in five specific factors as discussed in the "Summary of Factors Affecting the Species" section of this rule. As discussed in that section of this rule, development has been a contributing factor in the destruction, modification, and fragmentation of the habitat of the Karner blue butterfly. The Service believes that additional protection and management of habitat for the Karner blue butterfly is essential for its survival. Management of habitat for the Karner blue butterfly requires maintaining openings in pine barrens, oak savanna, and sandplain habitat, particularly where natural processes have been curtailed, in order to allow the growth of the plant species wild lupine, upon which the Karner blue butterfly depends. Broad-scale conversion of forests to create Karner blue butterfly habitat would not be appropriate or necessary for proper management of this species. There may be many opinions as to a particular species' contribution to society including its aesthetic, scientific, ecological, or other significance,

however this contribution of a species to society is not among the five factors upon which a listing determination is based.

Issue 2. Both commenters at the public hearing favored protection of the Karner blue butterfly and its habitat, and in particular, a specific area in the city of Altoona, Wisconsin. Mrs. Kelley commented on the potential of this area to provide habitat for the Karner blue butterfly. Dr. Pautz's statement pointed out the existence of suitable habitat in the Altoona area, and provided additional information on other sites in Wisconsin. Dr. Pautz's original comments requesting the hearing and his statement at the hearing contended there was a need for additional studies to determine the extent of Karner blue populations and habitat in the Altoona area prior to listing, and that Karner blue butterflies were found in more abundance in Wisconsin than indicated in the proposed rule.

Karner blue surveys were conducted in 1992 in the Altoona area in conjunction with review of a proposed highway project. Several sites that appeared to furnish suitable habitat were located during first flight period surveys in early June. However, resurvey of these areas during the second flight by a University of Minnesota graduate student who is conducting research on this species failed to locate any Karner blues at four sites and found only seven butterflies at a fifth site (Lane 1992b).

The text of this rule has been updated to reflect the most recent available data on the Karner blue butterfly's status in Wisconsin. As discussed in response to Issue 4, below, the Service believes that this butterfly warrants endangered status due to the danger of extinction in all or a significant portion of its range. The Service is confident that recent surveys have located most large Karner blue populations in Wisconsin. Furthermore, even relatively large extant populations cannot be considered secure unless threats from succession have been alleviated.

Issue 3. Dr. Pautz's statement expressed concern that the Service had proposed a finding that critical habitat determination for the Karner blue butterfly is presently not determinable. He recommended that the Service develop a description of critical habitat elements, and that studies should be conducted in the Altoona area so that critical habitat could be designated at the time of listing. In addition, 17 written comments were received that expressed concern that critical habitat was not being designated at the time of listing, suggested specific locations for

designation provided information on potential areas and habitat characteristics, or offered assistance in critical habitat designation.

The Service responds that the rationale for not designating critical habitat at the time of listing is detailed in the "Critical Habitat" Sections of the proposed rule and this final rule. The Service concluded that designation of critical habitat is not presently determinable as defined under implementing regulations at 50 CFR 424.12(a)(2). As discussed in the "Critical Habitat" section of this document, the Service is working with interested parties throughout the Karner blue butterfly's range to obtain necessary information to define the primary constituent elements of critical habitat, identify and map areas that should be designated, and ascertain the economic impacts of designation. The Service will consider information provided by commenters during formulation of the critical habitat proposal.

When a finding is made that critical habitat is not determinable at the time of listing, the regulations at 50 CFR 424.17(b)(2) provide that the designation of critical habitat be completed to the maximum extent prudent within two years from the date of publication of the proposed rule to list the species. Any proposal to designate critical habitat will be published in the *Federal Register* including maps and legal descriptions of all areas included in the proposal, and public comments will be solicited. The potential economic impacts of the critical habitat designation will be evaluated during the preparation of the required economic analysis.

Issue 4. The Wisconsin Department of Natural Resources noted that Wisconsin still supports a relatively large number of populations of Karner blue butterflies, that some are "quite sizable" with seemingly good potential for long-term viability with favorable management, and recommended that the Karner blue butterfly be designated threatened, rather than endangered. A professional lepidopterist also expressed the opinion that designation as threatened would be appropriate.

The Service responds that endangered status is warranted in situations where the species is in danger of extinction throughout all or a significant portion of its range. The Service recognizes that a few sizable populations with potential for long-term viability, are still extant; however, immediate protection and habitat management are deemed crucial to short- and long-term viability of Karner blue populations, even at these

larger sites. The viability of many smaller sites, some of which may be very important to the recovery of the species, is even less certain. As discussed in the "Summary of Factors Affecting the Species" section, the fragility of remaining populations is exemplified by the recent loss of the population in Ontario due to adverse weather conditions. Major habitat restoration efforts were underway, and managers believed that this population of about 1000 second-brood adults was secure for the short- to medium-term. The collapse of the Albany Pine Bush population in New York, from around 80,000 butterflies in 1979 to 100-200 butterflies only eleven years later also illustrates the extreme vulnerability of this species. Considering the severity of decline the Karner blue butterfly has undergone in the past 10 to 15 years, the magnitude and imminence of the threats, and the vulnerability of existing populations, the Service concludes that the Karner blue butterfly is in danger of extinction without immediate and continuing protection and habitat management, and therefore, classification as endangered is warranted.

Issue 5. One commenter pointed out that evaluation of the Karner blue butterfly's relative status among the states must take into account the method of data collection and how the results were calculated. Some of the data were obtained through transect surveys and others from mark-release-recapture (MRR) methods, and the two methods are not directly comparable.

The Service recognizes that direct comparison of data collected using different methods or under different circumstances is inappropriate. The presentation of status information in this document is not intended to provide a direct comparison of population sizes among the states, rather it is presented on a state-by-state basis as an indicator of the decline that the Karner blue butterfly has undergone throughout its range. Recovery planning for this species will involve continued monitoring of its status, and the Service will be working with those involved in monitoring to develop appropriate and consistent survey methods.

Issue 6. Two commenters stated the need to clarify how prohibitions against "take" would be applied, particularly regarding research and management activities. One commenter suggested that taking of one or two voucher specimens be allowed to assure adequate documentation of new sites. Another commenter expressed concern about mark-release-recapture (MRR)

work with Karner blue butterflies and its potential to cause injury or mortality.

The Service responds that "take" as defined in Section 3(18) of the Act means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or attempt to engage in any such conduct, and the prohibitions against "take" are applicable to any person subject to the jurisdiction of the United States. Regulations at 50 CFR 17.3 define "harm" as an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. Since some form of the Karner blue butterfly (eggs, larvae, or adults) is present at all times in habitat where it occurs, prohibitions against "take" would apply to activities involving both the butterflies or the occupied habitat. As discussed in the "Available Conservation Measures" section of this document, permits can be issued for activities to enhance the propagation or survival of listed species. The procedures for obtaining such permits for activities involving endangered species are found in the regulations at 50 CFR 17.22. The Service recognizes the need to conduct various research and management activities for this species that will require permits, and will work closely with those involved to authorize appropriate activities. The potential effects of MRR work on Karner blue butterflies will be carefully considered by the Service in the issuance of any such permits, and during the planning of recovery activities for this species.

Issue 7. One commenter recommended that the Karner blue butterfly be listed as an endangered species, and with it, wild lupine, the only known larval food plant for this species.

The Service responds that although wild lupine has declined within the range of the Karner blue butterfly, this plant species has a wider distribution than the Karner blue butterfly, and lupine is more abundant in other parts of its range. Lupine also persists in some areas within the Karner blue range where the butterflies are no longer found. Information available to the Service does not suggest that lupine warrants consideration for Federal listing.

Issue 8. The Newaygo County Board of Commissioners in Michigan expressed conditional support for listing the Karner blue butterfly, provided the listing does not affect spraying in

connection with the gypsy moth eradication program.

The Service responds that as a result of cooperation between the Service, the Michigan Department of Natural Resources, the Michigan Department of Agriculture, and the U.S. Forest Service (Forest Service) regarding the 1992 Forest Service Gypsy Moth Suppression Program in Michigan, a plan was developed to address protection of natural resources of concern, including the Karner blue butterfly. The plan included establishing no-spray areas and buffer zones around occupied habitat. The Service recognizes there are potential conflicts with protection of the Karner blue butterfly in implementing both Federal and non-Federal spraying programs. The Service will continue working with the Forest Service in reviewing future spraying plans, and will be working with non-Federal programs and examining additional alternatives, such as ground spraying in certain areas and timing of application, in order to allow suppression programs to proceed. Federal listing will extend the protection against taking under Section 9 of the Act, and will require Federal agencies to consult with the Service on activities affecting the Karner blue butterfly under Section 7 of the Act. However, the Karner blue butterfly has been listed as a threatened species by the State of Michigan and, therefore, it presently receives some protection from take under State law. The Service anticipates continuing coordination and cooperation among all those involved regarding this issue.

Summary of Factors Affecting the Species

After a thorough review and consideration of all information available, the Service has determined that the Karner blue butterfly (*Lycaeides melissa samuelis*) should be classified as an endangered species. Procedures found at Section 4(a)(1) of the Endangered Species Act (16 U.S.C. 1531 *et seq.*) and regulations (50 CFR part 424) promulgated to implement the listing provisions of the Act were followed. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in Section 4(a)(1). These factors and their application to the Karner blue butterfly (*Lycaeides melissa samuelis*) are as follows:

A. The present or threatened destruction, modification, or curtailment of its habitat or range. Throughout its range, changes in the habitat occupied by the Karner blue butterfly resulting from silviculture, urbanization, and the declining

frequency of wildfires are largely the reasons for its decline (D. Schweitzer, *in litt.*, 1991). Modification and destruction of habitat and fragmentation of remaining areas are continuing threats to the survival of this butterfly. In addition to direct destruction of suitable habitat, urbanization has led to fire suppression on interspersed habitat; in the absence of fire, vegetational succession has made this habitat unsuitable. The threats due to fire suppression are discussed in more detail under Factor E.

In New York, the decline of the Karner blue butterfly resulting from loss and alteration of habitat is largely due to industrial, commercial, and residential development; fire suppression; vegetational succession; and habitat fragmentation. Although very little of the species' decline in the Albany Pine Bush since 1979 can be attributed to overt habitat loss from development, prior to then over 90 percent of the Pine Bush was destroyed over a period of perhaps 250 years (Schweitzer, *in litt.*, 1992). The Albany Pine Bush, which once covered at least 25,000 acres, has been reduced to about 2,500 acres (Givnish *et al.*, 1988). The recent decline in the Albany Pine Bush population can be attributed largely to improper or absent habitat management. Zaremba (1991) noted that in addition to habitat loss, dissection of metapopulations by development such as buildings and roads is a major threat to the Karner blue butterfly in New York, along with detrimental management of lupine stands and habitat disturbance due to off-road vehicles and horseback riding.

Habitat fragmentation and loss of habitat through development, combined with the extremely small size of the remaining population (discussed under Factor E), are the greatest threats to the Karner blue butterfly's continued existence in New England. The pine barrens in New Hampshire have largely been destroyed as a result of industrial, commercial, and residential development; road and airport construction; and gravel and sand mining. A major retail mall, recently completed on the outer edges of Concord's pine barrens, will encourage additional commercial development and further encroachments into pine barren habitat. Remaining fragments of this natural community are threatened by continued development pressures, vegetational succession in the absence of periodic fires, airport expansion, and degradation due to off-road vehicular use. Spurduto (New Hampshire Natural Heritage Inventory, pers. comm., 1991) estimated that 90 to 95+ percent of the

historic pine barrens in the Merrimack system have disappeared.

Wisconsin's native savanna or pine and oak barrens community, which historically was quite prevalent throughout central and northwestern Wisconsin, and which very likely once supported many large metapopulations of this taxon, has declined severely. The Wisconsin Department of Natural Resources also reports that very few large contiguous barrens tracts remain in Wisconsin and cite the following threats to Karner blue habitat: fire suppression and succession, conversion to agriculture and pine or Christmas tree plantations, and other development. The Department states: "These threats remain paramount, and in fact are intensified, today (Besadny, *in litt.*, 1992)." Wisconsin still harbors some relatively large Karner blue populations and there are opportunities for long-term management and protection, but a significant long-term habitat management effort will be required if this potential is to be realized. Many other remnant populations of the Karner blue butterfly in Wisconsin are small and widely scattered, occurring in isolated patches of habitat along roadsides, power line clearings, and on abandoned agricultural fields (Bleser 1990).

In Michigan, the major cause for the butterfly's decline has been the degradation and loss of habitat as a result of succession and development. The habitat has been affected by fire suppression, agriculture, silviculture, and off-road vehicles. Remaining Karner blue butterfly populations continue to be threatened by the decline and loss of wild lupine populations resulting from these factors (Wilsman 1990).

The two major threats in Indiana identified by C. Hedge (pers. comm., 1991) are destruction of habitat by development, and succession resulting from fire suppression.

Cuthrell (1990) identified fire suppression, development, and other human disturbance as causes for the loss of Karner blue butterfly habitat in Minnesota. The major threat to the extant sites is succession, but potential logging of the oak savannas also poses a threat (R. Baker, Minnesota Department of Natural Resources, pers. comm., 1991).

Irwin and Downey (1979) discussed the Karner blue butterfly as "another species that may have become extinct in Illinois . . . as a possible result of ecological change."

B. Overutilization for commercial, recreational, scientific, or educational purposes. There have been large scientific collections of Karner blues in

the past (R. Zaremba, The Nature Conservancy, pers. comm., 1991), although past collecting is not considered to have been a significant factor in the butterfly's decline to its present condition. However, the Karner blue butterfly's rarity and distinctively beautiful coloration may make it a desirable addition to private collections. Because the Karner blue butterfly's numbers are so low throughout its range, additional taking or collecting for any purpose other than part of a carefully planned recovery action may eliminate some populations and hamper recovery efforts.

C. Disease or predation. Disease and predation have not been documented as factors in the decline of this species.

D. The inadequacy of existing regulatory mechanisms. The Karner blue butterfly is listed as endangered or threatened by several states:

In New York, the Karner blue butterfly is listed as endangered, and the animals and parts thereof, including eggs and larvae, are protected from unauthorized take, import, transport, possession, or sale.

The State of Minnesota lists the Karner blue butterfly as a threatened species. Minnesota law protects state listed animals from take, import, transport, or sale.

In New Hampshire, the Karner blue butterfly is listed as endangered and is protected from unauthorized taking. While New Hampshire law directs other State agencies to avoid funding, carrying out, or authorizing actions that result in the destruction of essential habitat, it has not prevented the loss of habitat through development of private property. Wild lupine is listed by New Hampshire as an endangered plant species. It is protected by the New Hampshire Native Plant Protection Act of 1987, which is implemented by the New Hampshire Natural Heritage Inventory within the Department of Resources and Economic Development. However, this legislation does not prevent alteration of wild lupine habitat on private land with the landowner's permission.

In Wisconsin, the Karner blue butterfly has been recommended for addition to the State list as threatened, and the Department of Natural Resources reports that it hopes to formally propose the listing during 1992 (Besadny *in litt.*, 1992). In addition to protection from take at occupied sites, Wisconsin law provides for protection and management of habitat of State listed species on public lands, where a significant proportion of Wisconsin Karner blue occurrences are found.

In Michigan, the Karner blue butterfly is listed as a threatened species. Michigan law prevents taking of listed animals and protects occupied habitat, and would thereby afford protection for eggs and larvae at known sites.

The State of Indiana currently does not have an official State list for insects.

The Karner blue butterfly has not been listed by the State of Illinois due to the fact that it was believed extirpated in that State.

With the recent rediscovery of a population, Illinois is likely to list the Karner blue as endangered, although Federal listing will automatically place the species on the Illinois endangered species list (S. Lauzon, pers. comm., 1992). Under Illinois State law, all life forms of listed species are protected from take, and therefore, known occupied habitat would also receive some protection. Some additional habitat protection is also provided to listed species through a provision requiring a consultation process to assess the impacts or actions authorized, funded, or carried out by State or local governments (S. Lauzon, *in litt.*, 1992).

While most states with extant Karner blue butterfly populations have legislation which protects the animals, provisions for protection and management of the habitat are incomplete to non-existent. Destruction and alteration of habitat are major reasons for the butterfly's decline.

Some populations of Karner blue butterflies occur on Federal, State, or privately owned parks, wildlife refuges, or preserves and are thereby recognized and protected. However, this protection has not prevented the range-wide declines of the Karner blue and its habitat due to the reasons discussed in Section A above, and Section E below.

The pine barrens and oak savannas where the Karner blue butterfly occurs are uplands underlain by extremely well-drained sandy soils and are thus afforded no protection by Federal or State wetland regulations. Upon Federal listing of the Karner blue butterfly, there will be additional protection provided from take or transport of the species, and from habitat alteration carried out, funded, or authorized by Federal agencies. The Endangered Species Act also provides for needed habitat management through the recovery process.

E. Other natural or manmade factors affecting its continued existence. The presence of wild lupine is essential to the occurrence and survival of the Karner blue butterfly. Unaltered by humans, a pine barren ecosystem is likely to be a mosaic of interspersed woody vegetation, such as pitch pine (*Pinus rigida*) and scrub oak (*Quercus ilicifolia*) and more open areas characterized by wild lupine, grasses, and other plants such as spreading dogbane (*Apocynum androsaemifolium*) and New Jersey tea (*Ceanothus americanus*) which serve as nectar sources for adult butterflies (The Nature Conservancy 1990).

Historically, the pine barren and oak savanna communities were maintained by naturally occurring, periodic fires that released nutrients and created openings favorable for wild lupine and other low growing plants. Residential

and commercial development in and adjacent to these areas has led to fire suppression. Without fire, vegetational succession to unsuitable habitat occurs on interspersed undeveloped areas. In the absence of fire, many areas once dotted with openings and wild lupine are now dominated by forest, with little or no understory. Fire suppression has affected habitat throughout the range of the Karner blue butterfly.

Since no life stage of the Karner blue butterfly is completely resistant to fire, recently burned lupine sites must be colonized by Karner blue butterflies from nearby unburned sites (Schweitzer 1989, Givnish *et al.* 1988). Maintenance of the Karner blue butterfly depends on its ability to disperse to newly expanded wild lupine sites (Zaremba 1991, Givnish *et al.* 1988, Schweitzer 1989). Fragmentation of remaining habitat prevents dispersal and results in small isolated populations.

With small, isolated, and declining populations, the subspecies is highly vulnerable to extinction. Extreme isolation, whether by geographic distance, ecological factors, or reproductive strategy, will prevent the influx of new genetic material and can result in a highly inbred population with low viability and/or fecundity (Chesser 1983). Natural fluctuations in rainfall, host plant vigor, or predation may weaken a population to such an extent that recovery to a viable level would be impossible. Isolation prevents recolonization by butterflies from other metapopulations, resulting in extinction.

Small remnant populations are highly vulnerable to a variety of factors. Weather events can eliminate such populations, as exemplified by the failure of the Ontario, Canada remnant to survive the impacts of drought in 1988, followed by unusually cold weather in May and June of 1989 (D. Schweitzer, *in litt.*, 1991). This population was estimated by Schweitzer to be around 1000 adults in July 1984, which is better than all but a few of the populations remaining today. Its demise occurred within five or six years, despite habitat acquisition and protection. Weather events can affect the species and its habitat throughout its range, pointing out the fragility of the many small, and even the larger, remaining remnant populations. Improper management of existing wild lupine habitat, including untimely mowing, the improper use of herbicides along highways and power line rights-of-way, and poorly timed and/or configured burns, also threaten remnant populations (D. Schweitzer, *in litt.*, 1991, Bleser 1990, Zaremba 1991).

Browsing of wild lupine by deer, rabbits, and/or woodchucks also poses a threat (D. Sperduto, pers. comm., 1991; D. Schweitzer and D. Savignano, 1992, in Givnish *et al.* 1988). A relationship between the scarcity of adult nectar sources and Karner blue butterfly abundance has also been observed (Bleser 1990; D. Sperduto, pers. comm., 1991). Flowering of nectar plants like New Jersey tea (*Ceanothus americanus*) can get out of synchrony with the adult butterflies; therefore, lack of diverse nectar plants may contribute to Karner blue population declines, especially in the western part of its range (D. Schweitzer, *in litt.*, 1992).

The Service has carefully assessed the best scientific information available regarding the past, present, and future threats faced by this subspecies in determining to finalize this rule. Based on this evaluation, the preferred action is to list the Karner blue butterfly as endangered. It has been extirpated from three states in the U.S., is virtually extirpated from Canada, and has undergone significant decline in all six states with remaining populations. Due to the magnitude of the range-wide decline of the Karner blue butterfly, particularly within the past decade, and the continuing threats from destruction, succession, and fragmentation of its habitat, this butterfly is in need of Federal protection if it is to survive. These factors support listing the Karner blue butterfly as an endangered species.

Critical Habitat

Section 4(a)(3) of the Act is amended, requires that, to the maximum extent prudent and determinable, the Secretary propose critical habitat at the time the species is proposed for listing as endangered or threatened. Section 3 of the Act defines critical habitat as, "(i) The specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management considerations or protection, and (ii) specific areas outside the geographical area occupied by a species at the time it is listed, upon determination that such areas are essential for the conservation of the species." Designation of critical habitat is prudent unless: (1) the species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of threat to the species, or (2) such designation of critical habitat would not be beneficial to the species (50 CFR 424.12(a)(1)). Designation of

critical habitat is determinable unless: (1) Information sufficient to perform the required analyses of the impacts of the designation is lacking, or (2) the biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat (50 CFR 424.12(a)(2)).

The Service finds that designation of critical habitat for the Karner blue butterfly is not presently determinable. Most existing populations of this butterfly are located on highly fragmented habitat of declining suitability. The size, spatial configuration, and juxtaposition of habitat areas required to provide for the long-term survival of existing populations have not been identified. Range-wide conservation of the Karner blue butterfly may also require protection and/or restoration of habitat in areas where the species is now extirpated. In addition, information needed to analyze the impacts of critical habitat designation is unavailable at this time.

Since publication of the proposed rule, the Service has initiated efforts to obtain the information needed to determine critical habitat for the Karner blue butterfly. A population and habitat viability analysis (PHVA) workshop was conducted by the IUCN/SSC Captive Breeding Specialist Group and a symposium on the Karner blue butterfly was held during April 1992. Researchers, species experts, agency representatives, and interested individuals from across the Karner blue butterfly's range participated in the workshop and symposium. Information from the symposium and the forthcoming report on the results of the PHVA will be used in determining critical habitat for the Karner blue butterfly.

When the Service finds that critical habitat is not determinable at the time of listing, regulations (50 CFR 424.17(b)(2)) provide that the designation of critical habitat be completed within two years of the date of the proposed rule to list the species. A proposed rule for critical habitat designation must be published in the *Federal Register*, and the notification process and public comment provisions parallel those for a species listing. In addition, the Service will evaluate the economic and other relevant impacts of the critical habitat designation, as required under Section 4(b)(2) of the Act.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Endangered

Species Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing encourages and results in conservation actions by Federal, State, and private agencies, groups, and individuals. The Endangered Species Act provides for possible land acquisition and cooperation with the States and requires that recovery actions be carried out for all species. The protection required of Federal agencies and the prohibitions against taking and harm are discussed, in part, below.

Section 7(a) of the Act, as amended, requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to critical habitat, if any is being designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service. Federal involvement under section 7 is expected for management and other land use activities on Federal lands with Karner blue butterfly populations. The Fish and Wildlife Service and the National Park Service are currently conferring about the effects of proposed prescribed burning of Karner blue habitat at Indiana Dunes National Lakeshore. Other Federally-administered locations include U.S. Forest Service lands in Michigan, lands in New Hampshire for which the U.S. Fish and Wildlife Service holds conservation easements, and U.S. Fish and Wildlife Service National Wildlife Refuge lands and Department of Defense lands in Wisconsin. Activities which are funded, regulated, or carried out by the Federal Aviation Administration involving the airport lands in New York and New Hampshire where Karner blue butterflies occur will require section 7 consultation. Some development projects involving Karner blue butterfly sites could require authorization from the U.S. Army Corps of Engineers (Corps) for certain project related activities in regulated waters or wetlands of the United States. The Corps is reviewing a permit application for a proposed marina that may adversely affect the newly rediscovered Illinois population.

Listing the Karner blue butterfly will encourage additional research and provide for the development of needed habitat protection and management strategies through the recovery process. Additional information is needed on specific habitat characteristics such as plant community species and structure, soil dryness, shading, and other factors that may affect the suitability of the habitat for Karner blue butterflies. Likely recovery activities would also include continued monitoring, evaluation of habitat management techniques, development of site-specific protection and management plans, and investigations into re-establishing populations.

The Act and implementing regulations found at 50 CFR 17.21 set forth a series of general prohibitions and exceptions that apply to all endangered wildlife. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to take, import or export, ship in interstate commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any listed species. It also is illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to agents of the Service and State conservation agencies.

Permits may be issued to carry out otherwise prohibited activities involving endangered wildlife species under certain circumstances. Regulations governing permits are at 50 CFR 17.22 and 17.23. Such permits are available for scientific purposes, to enhance the propagation or survival of the species, and/or for incidental take in connection with otherwise lawful activities.

National Environmental Policy Act
The Fish and Wildlife Service has determined that an Environmental Assessment, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act of 1973, as amended. A notice outlining the Service's reasons for this determination was published in the *Federal Register* on October 25, 1983 (48 FR 49244).

References Cited

- Bleser, C. A. 1990. The Wisconsin 1990 status survey for the Karner blue butterfly (*Lycaeides melissa samuelis*). Final report submitted to the U.S. Fish and Wildlife Service by the Natural Heritage Inventory Program, Bureau of Endangered Resources, Wisconsin Dept. of Natural Resources, 27 pp.
- Chessier, R. K. 1983. Isolation by distance: relationship to the management of genetic resources. pp. 66-77 in Schonewald-Cox, S. M. Chambers, B. MacBryde and L. Thomas (ed.), *Genetics in Conservation: A Reference for Managing Wild Animal and Plant Populations*. The Benjamin/Cummings Pub. Co., Inc.
- Cuthrell, D. L. 1990. Status of the Karner blue butterfly, *Lycaeides melissa samuelis* Nabokov, in Minnesota 1990. Report submitted to the Minnesota Nongame Wildlife Program, 44 pp.
- Dirig, R. 1979. Occasional Publication Number 2. Pine Bush Historic Preservation Project, Inc., Albany, NY, 1 p.
- Givnish, T. J., E. S. Menges, and D. F. Schweitzer. 1988. Minimum area requirements for long-term conservation of the Albany Pine Bush and Karner blue butterfly: an assessment. (Vol. IV, Appendix T) Report to the City of Albany from Malcolm Pirnie, Inc., Albany, NY, 95 pp. + figures.
- Irwin, R. R., and J. C. Downey. 1973. Annotated checklist of the butterflies of Illinois. Illinois Natural History Survey, Biological Notes No. 81, Urbana, IL, 60 pp.
- Lane, C. P. 1992a. The status of the Karner blue butterfly (*Lycaeides melissa samuelis*: Lycaenidae) and its associated plant resources in Minnesota, 1991. Final report to the U.S. Fish and Wildlife Service, Minnesota Department of Natural Resources, and The Nature Conservancy, 36 pp.
- Lane, C. P. 1992b. Results of Karner blue survey for U.S. Highway 53 IH94 to USH 53/STH 121 Interchange, Eau Claire to Chippewa Counties. Wisconsin Department of Transportation Project 1199-04-00. August 1, 1992.
- Schweitzer, D. F. 1989. Fact sheet for the Karner blue butterfly with special reference to New York. The Nature Conservancy, internal document, 7 pp.
- Schweitzer, D.F. 1990. The status of selected Karner blue remnants in Saratoga and Albany Counties, New York with a discussion of monitoring methods. Report prepared for the New York State Department of Environmental Conservation, Endangered Species Unit, 23 pp.

Shull, E.M. 1987. The Butterflies of Indiana. Indiana Press, Bloomington & Indianapolis, pp. 163-164.

The Nature Conservancy. 1990. Final status survey report: habitat assessment of Karner blue butterfly (*Lycaeides melissa samuelis*). Report submitted to the U.S. Fish and Wildlife Service by the New Hampshire Natural Heritage Inventory, 13 pp.

Wilsmann, L. 1990. Karner blue (draft species abstract). Michigan Department of Natural Resources Wildlife Division, 7 pp. in prep.

Zarembka, R.E. 1991. Chapter 23: The management of Karner blue butterfly habitat in a suburban landscape. In *Challenges in the Conservation of Biological Resources*. (D.J. Decker, M.E. Krasny, G.R. Goff, C.R. Smith, D.W. Gross; eds.) Westview Press, Boulder, CO.

Author

The primary author of this final rule is Mark W. Clough (see ADDRESSES section).

List of Subjects in 50 CFR Part 17

Endangered and threatened species,
Exports, Imports, Reporting and
recordkeeping requirements, and
Transportation.

Regulation Promulgation

PART 17—[AMENDED]

Accordingly, part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations is amended as set forth below:

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361-1407; 16 U.S.C. 1531-1544; 16 U.S.C. 4201-4245; Pub. L. 99-625, 100 Stat. 3500, unless otherwise noted.

2. Amend § 17.11(h) by adding the following, in alphabetical order, to the List of Endangered and Threatened Wildlife, under "INSECTS".

§ 17.11 Endangered and threatened wildlife.

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(b) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						

Species		Historic range	Vertebrate pop- ulation where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
INSECTS							
Butterfly, Karner blue	<i>Lycaeides melissa samuelis</i> U.S.A. (IL, IN, MA, MI, MN, NH, NY, OH, PA, WI, Canada (Ont.)).	NA	E	484	NA	NA	

Dated: November 27, 1992.

Bruce Blanchard,

Acting Director, Fish and Wildlife Service.

[FR Doc. 92-30173 Filed 12-11-92; 8:45 am]

BILLING CODE 4310-55-M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018-AB52

Endangered and Threatened Wildlife and Plants; Determination of Endangered or Threatened Status for Five Aquatic Snails in South Central Idaho

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The U.S. Fish and Wildlife Service (Service) determines endangered status pursuant to the Endangered Species Act of 1973, as amended (Act), for four Snake River aquatic snails: The Idaho springsnail or Homedale Creek springsnail (*Pyrgulopsis* (*Fontelicella*) *idahoensis*), the Utah valvata snail (*Valvata utahensis*), Snake River Physa snail (*Physa natricina*), and the undescribed Banbury Springs lanx or limpet in the genus *Lanx*. The Service also determines threatened status for one aquatic snail species, the Bliss Rapids snail (an undescribed monotypic genus in the family Hydrobiidae). With the exception of *Lanx*, four of the taxa have declined over all but a small fraction of their historical range. Today these five species are currently restricted to a few isolated free-flowing reaches or spring alcove habitats in the middle Snake River characterized by cold, well-oxygenated, unpolluted water. *Lanx* has remained relatively stable at three known locations since its discovery in 1988. However, because, *Lanx* is known only from three sites it is most vulnerable to habitat change.

The free-flowing, cool water environments required by these species have been impacted by and are vulnerable to continued adverse habitat modification and deteriorating water quality from one or more of the following: hydroelectric development, peak-loading effects from existing hydroelectric project operations, water withdrawal and diversions, water pollution, and inadequate regulatory mechanisms. This is especially true for those species restricted to mainstem river environments, *Physa natricina* and *Pyrgulopsis idahoensis*, but also mainstem colonies of Bliss Rapids snails and *Valvata utahensis*. These mainstem populations or colonies may also be vulnerable to habitat competition from an exotic snail (*Potamopyrgus antipodarum*). With the exception of several spring habitats at a privately owned preserve in the Thousand Springs area, remaining pristine spring and spring stream complexes in the middle Snake River preferred by *Lanx*, Bliss Rapids snail and Utah valvata are not protected from all potential threats described above. This rule implements the protection and recovery provisions afforded by the Act for these aquatic snails.

EFFECTIVE DATE: January 13, 1993.

ADDRESSES: The complete file for this rule is available for inspection, by appointment, during normal business hours at the Boise Field Office, U.S. Fish & Wildlife Service, 4696, Overland Road, Room 576, Boise, Idaho 83705.

FOR FURTHER INFORMATION CONTACT: Dr. Charles Lobdell at the above address (telephone 208/334-1931).

SUPPLEMENTARY INFORMATION:**Background**

The Idaho (Homedale) Springsnail (*Pyrgulopsis-Fontelicella idahoensis*), Bliss Rapids snail (Family Hydrobiidae n. sp.), Banbury Springs lanx or limpet (*Lanx* n. sp.), Snake River Physa (*Physa natricina*), and Utah Valvata snail (*Valvata utahensis*) are part of the native mollusc fauna of the middle

SNAKE RIVER which characteristically require cold, fastwater or lotic habitats. These five species are part of the freshwater mollusc fauna of the middle Snake River comprising 37 native species including 22 taxa of snails in eight families and 15 clam species in three families (Frest *et al.* 1991). Although many of these 37 species display widespread geographic distribution and a greater tolerance for pollution, the five lotic species are limited geographically and generally intolerant of pollution. The "middle" Snake River is defined as extending from C.J. Strike Reservoir (river mile 517.6) upstream to Milner Dam (river mile 639.1). With few exceptions, extant populations of the five taxa are confined to this reach; although prior to river development and impoundment these and other native molluscs "extended beyond these artificial and manmade boundaries" (Frest *et al.* 1991).

The lotic fauna of the middle Snake River have been declining for several years due to fragmentation of remaining free-flowing habitats and deteriorating water quality. Hydroelectric development throughout the Snake River has directly impacted the candidate species through inundation of lotic habitats, isolating segmented populations, and impacting suitable shallow water shoreline habitat from project-caused flow fluctuations. Water quality continues to degrade in the middle Snake River from increased water use and withdrawal, aggravated by recent drought induced low flows. This 121 mile (195 kilometer) stretch of the Snake River is impacted by agricultural return flows; runoff from between 500 and 600 dairies and feedlots; effluent from over 140 private, state, and Federal fish culture facilities; and point source (e.g. municipal sewage) discharge (Idaho Department of Health and Welfare (IDHW) 1991a). These factors contribute to increased nutrient loads and concentrations which in turn adversely impact the lotic species. Nutrient loading contributes to dense blooms of free-living and attached

filamentous algae, which the species cannot utilize. This algae will often cover rock surfaces, effectively displacing suitable snail habitats and food resources. Stream sediments also become anoxic as high biochemical oxygen demand during the aquatic growing season and seasonal algae dieoffs occur.

The Bliss Rapids snail, Idaho springsnail, and Snake River Physa snail are "living fossils," in that they are relicts from ancient lakes. The Bliss Rapids snail and Idaho springsnail are survivors of the late Pliocene (Blancan) Lake Idaho, which covered much of southern Idaho. The Snake River Physa snail is a relict from Pleistocene lakes and rivers in the area (Taylor 1988). The Utah valvata snail survives only in the Snake River, Idaho, a fraction of its former range in Pliocene-Pleistocene lakes and rivers covering parts of California, Nevada, Idaho, Wyoming and Utah (Taylor 1985b). Fossil material of the Pliocene *Lanx* is needed to confirm the identity of the newly discovered species as being conspecific with the Lake Idaho *Lanx*, though this is a new species in any case.

The Bliss Rapids snail (Family Hydrobiidae, n. sp.) was first collected live and recognized as a new taxon in 1959 (Taylor 1982a), but has not yet been described in the literature. This snail is 2.0–2.5 mm (0.8–1.0 in) long, with three whorls, and is roughly ovoid in shape. There are two color variants or morphs in the Bliss Rapids snail, the colorless or "pale" form and the orange-red or "orange" form. The pale morph is slightly smaller with rounded whorls with more melanin pigment on the body (Frest and Johannes 1992a). This snail occurs on stable, cobble-boulder substratum only in flowing waters in the unpounded reaches of mainstem Snake River and also in a few spring alcove habitats in the Hagerman Valley. The species does not burrow in sediments and normally avoids surfaces with attached plants. Known river populations (or colonies) of the Bliss Rapids snail occur only in areas associated with spring influences or rapids edge environments and tend to flank shorelines. They are found at varying depths if dissolved oxygen and temperature requirements persist and are found in shallow (<1 cm (.4 in)) permanent cold springs (Frest and Johannes 1992a). The species is considered moderately photophobic and resides on the lateral sides and undersides of rocks during daylight (Bowler 1990). The snail will migrate to graze on *aufwuchs* (or perolithon) on the uppermost surfaces of rocks nocturnally. The species can be locally

quite abundant, and it is especially abundant on smooth rock surfaces with common encrusting red algae. The largest known concentration of Bliss Rapids snails occurs at The Nature Conservancy's (Conservancy) Thousand Springs Preserve (Preserve) with an adult population estimated in the "low millions" (Frest and Johannes 1992a). Reproduction in the Bliss Rapids snail varies according to habitat; occurring October–February in mainstem Snake River colonies and February–May in large-spring colonies. Egg laying occurs within two months of reproduction and eggs appear to hatch within one month. Adult snails exhibit a strong seasonal die off after reproduction. Turnover appears more pronounced in mainstem river colonies, possibly due to environmental stress (Frest and Johannes 1992a). Prior to 1987, the Bliss Rapids snail was known primarily from the mainstem Snake River boulder bars above King Hill (approximately river mile 546) to lower Salmon Falls Dam (river mile 573) and upstream in Box Canyon Springs (river mile 588). Taylor (1982a) believed that " * * * prior to dam construction there was probably a single population throughout this range, and plausibly upstream as well." Subsequent mollusc surveys by Frest (1991b), Pentec (1991b) and Taylor (1987) found new subpopulations of the Bliss Rapids snail in the mainstem Snake River and adjacent spring habitats. Pentec (1991b) extended the present known range of the species upstream approximately 162 miles when it found specimens in spring habitats above American Falls at river mile 749.8. Based on live collections, the species currently exists as discontinuously distributed populations over 204 river miles within its historic range. These populations are primarily concentrated in the Hagerman reach in tailwaters of Bliss and Lower Salmon Dams and several unpolluted springs (i.e., Thousand Springs, Minnie Miller Springs, Banbury Springs, Niagara Springs, and Box Canyon Springs).

Call (1884) described the Utah valvata snail (*Valvata utahensis*) from Utah Lake, Utah, as *Valvata sincera* var. *utahensis*. Walker (1902) revised the genus *Valvata* and determined *V. utahensis* to be a species. The Utah valvata snail is 4.5 mm (.2 in) long, the shell is turbinate (about equally high and wide) with up to four whorls. In the Snake River, *V. utahensis* lives in deep pools adjacent to rapids or in perennial flowing waters associated with large spring complexes. The species avoids areas with heavy currents or rapids. The snail prefers well-oxygenated areas of

non-reducing calcareous mud or mud-sand substrate among beds of submergent aquatic vegetation. The species is absent from pure gravel-boulder bottoms. *Chara*, which concentrates both calcium carbonate (CaCO_3) and silicon oxide (SiO_2), is a common associate. The Utah valvata snail is primarily a detritivore, grazing along the mud surface ingesting diatoms or powdery plant debris. In habitats with boulders on mud, the snail has been observed grazing diatoms and other perolithon on rocky surfaces and macrophytes. The Utah valvata snail historically occurred from river mile 492 (near Grandview) to river mile 585 just above Thousand Springs with a disjunct population in the American Falls Dam tailwater near Eagle Rock damsite at river mile 709. The taxa was known historically from northern Utah, although recent mollusc surveys throughout the State revealed no live sites and the species is believed extirpated there (Clarke 1991). At present this species occurs in a few springs and mainstem Snake River sites in the Hagerman Valley and at a few sites below American Falls Dam downstream to Burley (Beak 1987; Taylor 1987). Recent surveys at the Conservancy's Preserve revealed declines in numbers and areal extent of Utah valvata over a four year period (Frest and Johannes 1992a). Live colonies of this snail persist in only two areas at the Preserve with a total population at each colony estimated not to exceed 6000 individuals. Density varied but averaged six live individuals counted per quarter meter square within each colony.

The Snake River Physa snail was named *Physa natricina* and described by Taylor in 1988. Fossil records of the species occur in deposits from Pleistocene-Holocene lakes and rivers from southeastern Idaho and northern Utah. The type locality is the Snake River, Gooding County, Idaho. The shells of adult Snake River Physa snails are about 5–7 mm (.2–.3 in) long with 3–3.5 whorls. Fresh shells are amber to brown in color. The species occurs on the undersides of gravel to boulder substratum in swift current in the mainstem Snake River. Living specimens have been found on boulders in the deepest accessible part of the river at the margins of rapids. Taylor (1982c) believed much of the habitat for this species was in deep water beyond the range of routine sampling. Taylor (1988) cites collections of this species from 1956 through 1985 and considered its "modern" range in the Snake River to extend from Grandview (based on

empty shells) upstream through the Hagerman Reach (river mile 573).

Taylor also believes that the Grandview subpopulation has become extinct since the early 1980's "... as the native bottom fauna has been virtually eliminated in this segment of the Snake River." Live specimens of the Snake River Physa were recorded near river mile 675 in 1987 (Beak 1987). Pentec (1991b) also reported single live animals at river miles 740.2 and 749.1, although Frest (1991d) believes these may be immature *Physella integra* or *Physella gyrina* and identification needs confirmation. Recent comprehensive snail surveys in southeastern Idaho and northern Utah (Frest et al. 1991) and in a free-flowing reach near Buel (Frest and Johannes 1992a) failed to find live specimens. At present, *Physa natricina* remains at only a few locations in the Hagerman and King Hill reaches, with a disjunct population near Minidoka Dam (river mile 675). Live Snake River Physa snails are always rare at collection sites; it is believed that fewer than 50 live Snake River Physa have been collected in the middle Snake River (Frest et al. 1991).

Using material collected near Homedale, Idaho by H.M. Tucker in 1930, H.A. Pilsbry described the Idaho (Homedale) springsnail as *Amicola idahoensis* (Pilsbry 1933). Gregg and Taylor (1965) established the new genus *Fontelicella* and placed *F. idahoensis* in the proposed new subgenus *Natricola*. Hershler and Thompson (1987), in a recent re-evaluation of North American hydrobiidae systematics, revised the genus and assigned *Fontelicella* to the genus *Pyrgulopsis*.

The Idaho springsnail has a narrowly elongate shell reaching a length of 5–7 mm (.2–.3 in), with up to 5.5–6 whorls. This species is found only in permanent, flowing waters of the mainstem Snake River; the snail is not found in any of the Snake River tributaries or in marginal springs (Taylor 1982d). The species occurs on mud or sand associated with gravel to boulder size substratum. It is often attached to vegetation (e.g. *Potamogeton*) in riffles. Very little is known of the life history. The Idaho springsnail is a Lake Idaho endemic, and in fossil form has the same potential relic range as the Bliss Rapids snail (Frest 1991c). Historically, the Idaho springsnail was found from river mile 415 (Homedale) to river mile 553 and has been collected at 10 locales. It is currently discontinuously distributed in the mainstem Snake River at a few sites from the headwaters of C.J. Strike Reservoir at river mile 518 upstream to approximately river mile 553 (Bancroft

Springs), a reduction of nearly 80 percent from its historic range. Based on repetitive visits to previous sampling sites, the species has declined and populations are small.

The Banbury Springs lanx or limpet (*Lanx* n. sp.) is a member of the Lancidae, a small family of pulmonates endemic to western North America. The species was first discovered by Terrence J. Frest in Banbury Springs Creek in 1988 and has not yet been formally described. The species is distinguished with a shell of uniform red cinnamon color, a subcentral apex, with its length and height exceeding its width. The species has been found only in spring run habitats with well oxygenated, clear, cold (15–16°C) waters on boulder or cobble substratum. All known locations have relatively swift currents. They are found most often on smooth basalt and avoid surfaces with large aquatic macrophytes or filamentous green algae. Beak Consultants, Inc. (Beak) (1989) reported the species (specimens originally identified as *Fisherola nuttalli*) at depths ranging from 30 to 75 cm (11.8–29.5 in) on boulder substratum. Frest and Johannes (1992a) found the species in water as shallow as 5 cm (2 in), but depths up to 15 cm (6 in) were more typical. All lancids are susceptible to dissolved oxygen fluctuations since respiration is accomplished only through the mantle; lungs, gills, and other specialized respiratory structures are lacking (Frest and Johannes 1992a). Common mollusc associates of this species include the Bliss Rapids snail and vagrant pebblesnail (*Fluminicola hindsii*).

This limpet was first discovered in 1988 at Banbury Springs (river mile 589) with a second population found in nearby Box Canyon Springs in 1989 (river mile 588). During 1991, a mollusc survey at the TNC's Preserve revealed a third population in the outflows of Minnie Miller Springs (river mile 584.6) (Pentec 1991b). Subsequent to this discovery, a more detailed investigation at the Preserve revealed that the single colony was sporadically distributed within an area of only 12–14 m² (Frest and Johannes 1992a). Population density was in the range of 4–48 per m². The total adult population at the Preserve was estimated at between 600 to 1,200 individuals. It should be noted that all three populations of *Lanx* were found in alcove spring complexes previously surveyed. These spring complexes contain large areas of adjacent presumably identical habitat not occupied by the species. At present the Banbury Springs lanx is known to occur only in the largest, least disturbed spring habitats at Banbury Springs, Box

Canyon Springs, and Thousand Springs between river miles 584.8 and 589.4. Today, these three locations are variously affected by ongoing water withdrawal and agricultural return flows.

Based on the fossil record, the five candidate snails are endemics originating in the area within Pliocene Lake Idaho and its Pleistocene successors (Taylor 1966). In general, the fossil record shows a larger past than current distribution, with past populations considered continuous throughout their range. An exception is the case of obligate spring species such as the Banbury Springs lanx; each geographically isolated spring could be considered a different population (Frest 1991c).

Ecologically, these five species share many habitat characteristics, and in some locations two or more are sympatric. Basically, they require cold, clean, well-oxygenated flowing water of low turbidity. All the species except the Utah valvata, and possibly the Idaho springsnail prefer gravel to boulder size substratum. Despite these affinities, each of the five species have slightly different habitat preferences. The Idaho springsnail and Snake River Physa are found only in the free-flowing mainstem Snake River while the remaining three candidates are usually associated with spring or spring-like river habitats. For example, the Bliss Rapids snail can be found in both small, shallow spring or large, deep spring outflows, while the Banbury Springs lanx is known only in large spring outflows. The Utah valvata snail is able to tolerate slower flowing environments with silty vegetated substrate better than the rest, although it cannot tolerate true impoundment or reservoir conditions (Frest 1989b). In the mainstem river, they are found in areas of the river not subject to daily or seasonal fluctuations. None of the species tolerate whitewater areas with rapid flow. The species also share similar life history characteristics related to longevity. With the possible exception of Snake River Physa and Utah valvata, the species are considered annual species with an average longevity of one year. Bliss Rapids snail and Banbury Springs lanx experience a dieoff of older adults during the late winter-early spring season following reproduction, although for the Bliss Rapids snail the dieoff is less pronounced in large-spring colonies (Frest and Johannes 1992a). Utah valvata are believed to have a maximum longevity of two years, although a majority only survive a single year. Although little is known of general life history for Snake River Physa, longevity

likely coincides with related *Physa* sp. and other pulmonates, averaging two years. Implications to survival of the candidate species is that annual species with localized distribution and small populations become vulnerable to extirpation from stochastic and/or catastrophic changes in environmental events. The remaining free-flowing river and spring/spring outflow habitats for these species has been fragmented between several impounded reaches of the Snake River in southern Idaho. The Swan Falls, C. J. Strike, Bliss, Lower Salmon Falls, and Upper Salmon Falls Dams on the mainstem Snake River inundated free-flowing habitat and have extirpated populations of these species. Past diversion of large spring outflows for hydroelectric and agricultural purposes have destroyed habitat for Bliss Rapids and Utah valvata snails in Box Canyon (Taylor 1985a) and Thousand Springs. Another more recent threat is the discovery of the New Zealand mudsnail (*Potamopyrgus antipodarum*) in the middle Snake River. The eurytopic mudsnail is experiencing explosive growth in the river and shows a wide range of tolerance for water fluctuations, velocity, temperature and turbidity. The species seems to prefer warmer, polluted waters over pristine cold spring environments. At present, it is not abundant in habitats preferred by Banbury Springs lanx, Bliss Rapids snail, or the Utah valvata. However, the species does compete directly for habitats of the Snake River Physa and Idaho springsnail in the mainstem Snake River. Today these endemic species remain only in a few isolated free-flowing segments between the dams and for some species, a few spring tributaries of the Snake River (Taylor 1982a, b, c, and d, Frest 1989a).

The bed of the Snake River is held in Public Trust by the State of Idaho. Snake River water flowing over the bed is subject to State and Federal water law and water can be appropriated for beneficial uses. Water in Box Canyon Springs Creek is also subject to appropriation. Land in the upper half of Box Canyon Springs Creek is privately owned and developed by Earl M. Hardy. Land in the lower end of Box Canyon Springs Creek is managed by the Bureau of Land Management (Taylor 1985a). Much of the remaining free flowing spring habitat at Thousand Springs is owned by The Nature Conservancy; jointly purchased by the Conservancy and Idaho Power Company in 1986.

This purchase provided protection for the nearly four miles of spring outflows and Minnie Miller Lake from further appropriation and development.

However, there are indications that water quality in some of the spring outflows is impacted by irrigation and aquaculture return flows initiating outside the Preserve's boundaries (Frest and Johannes 1992a).

Listing the subject species will result in increased protection of remaining free-flowing river and large spring habitat required by these and other sensitive native species such as the shortfin lantern or giant Columbia River limpet (*Fisherella nuttalli*) (Taylor 1982a,b,c and d) and the Shoshone sculpin (*Cottus greeneri*). These areas contain some of the last mainstem Snake River habitats with the full range of native molluscan species present, and thus represent a unique aquatic community.

Federal action on these five mollusks began in part as a result of several petitions submitted under section 4(b)(3) of the Act. Dr. Peter Bowler submitted a petition to list the Snake River Physa snail and the undescribed Bliss Rapids snail as endangered on February 7, 1980. A finding that this petition presented substantial information that the requested action may be warranted was published on April 23, 1980 (45 FR 27723). The Idaho springsnail was the subject of a petition submitted on November 12, 1987, by Dr. Bowler. The Service published on December 29, 1988, a finding that the petition to list the Idaho springsnail presented substantial information that listing may be warranted for this species. The Service initiated status reviews on these three species.

Section 4(b)(3)(B) of the Act requires the Service to make a finding within 1-year of the date a petition is received as to whether or not the requested action is warranted. If the Service finds that the requested action is warranted, but precluded by other pending proposals of higher priority, the Service must reevaluate the petition annually and make findings on whether or not the requested action is warranted. In the case of the Snake River Physa and Bliss Rapids snails, the first 12-month finding was published in the *Federal Register* on January 20, 1984 (49 FR 2485). Annual warranted, but precluded, findings were in effect from 1984 through publication of the proposed rule on December 18, 1990 (55 FR 51931).

Randall Morgan and others petitioned the Service to list an undescribed species in the genus *Lanx*, the Banbury Springs lanx, as endangered using the emergency provisions of the Act on November 13, 1989. Whereas the Service's status review did not disclose the existence of an emergency within

the meaning of section 4(b)(7) of the Act, it did indicate that proposing the *Lanx* for listing under the normal procedures of section 4 is warranted.

All of the subject species except the Banbury Springs lanx have been included as candidate species on the Service's notices of review. The Snake River Physa snail and the Bliss Rapids snail were first included as category 1 candidates in the 1984 Review of Invertebrate Wildlife (49 FR 21664); they retained this status in the January 6, 1989 Animal Notice of Review (54 FR 554). Category 1 candidates are those taxa for which the Service has on file enough substantial information on biological vulnerability and threats to support proposals to list them as endangered or threatened species. The Utah valvata snail appeared on the 1984 Review of Invertebrate Wildlife as a category 2 candidate, and remained as such on the 1989 Animal Notice of Review. The Idaho springsnail was first included as a category 2 candidate on the 1989 Animal Notice of Review. Category 2 candidates are taxa for which information now in possession of the Service indicates that proposing to list as endangered or threatened is possibly appropriate, but for which conclusive data on biological vulnerability and threat are not currently available to support proposed rules. The November 21, 1991 Animal Notice of Review (56 FR 58804), reflecting the proposed status of these taxa, included all five snails as "PE" (proposed for listing as endangered).

Based upon the petitions, status surveys, and other information on file, the Service published a proposed rule on December 18, 1990 (55 FR 51931) to list as endangered five aquatic snails: the Bliss Rapids snail, Snake River Physa snail, Idaho Springsnail, Utah valvata snail and the Banbury Springs lanx or limpet. The proposed rule included information provided by Taylor (1982 a, c, d, and 1988) and Frest (1989b) on the Bliss Rapids, Idaho spring, and Snake River Physa snails, by Taylor (1982b) for the Utah valvata snail, and by Frest (1989a) and the Service for the Banbury Springs lanx.

The Service now determines the Idaho springsnail, the Utah valvata snail, Snake River Physa snail, and Banbury Springs lanx to be endangered species and the Bliss Rapids snail to be a threatened species with publication of this rule.

Summary of Comments and Recommendations

In the December 18, 1990 proposed rule, all interested parties were requested to submit comments or

information that might contribute to the development of a final determination. The public comment period ended on February 19, 1991. On March 18, 1991, the Service published a Federal Register notice announcing public hearings and reopening and extension of the comment period through April 30, 1991 (56 FR 11401). Announcements of the proposed rule and the upcoming hearings were also published in two newspapers on March 18, 1991: the Idaho Statesman and the Twin Falls Times-News. Public hearings were held from 7 to 10 p.m. on April 3, 1991 in Boise, Idaho, and from 2 to 4 p.m. and 7 to 9 p.m. on April 4, 1991 in Hagerman, Idaho. Thirty-two commenters presented oral testimony. On June 4, 1991, the Service requested that C. Michael Falter, University of Idaho, assemble a panel of experts to review and summarize the existing technical knowledge on the status of the five snail species. To accommodate the technical review meeting and receive additional comments, the Service published a third notice, on October 7, 1991, reopening the comment period through October 31, 1991 (56 FR 50550). The technical review meeting was held on October 21-22, 1991, in Boise, Idaho with six participants. Three additional mollusc experts were invited but did not attend. However, these individuals did participate in a later review of the meeting summary and submitted detailed review comments and additional substantive information. The final Summary Report of the Technical Review Meeting was received by the Boise Field Office on March 26, 1992 (Falter 1992).

Ninety-eight written comments were received on the proposed rule. The Service considered all comments received, including oral testimony from two public hearings on the proposal to list the five aquatic snails. A majority of comments (n=60) supported the proposed rule. Opposition to the proposed rule was based on several factors, including the assertion that the proposed rule was based upon incomplete sources of knowledge on the true distribution and abundance of the snails. Five written comments opposed the proposed listing and eight letters requested a public hearing. In addition, three Idaho State agencies provided written comments. The Idaho Department of Parks and Recreation wrote in support of the listing, while the Idaho Department of Water Resources expressed interest in the listing proposal and requested the Service undertake an "... analysis of the constraints a listing would have on existing and

proposed projects in the designated reach . . ." The Idaho Division of Environmental Quality also submitted water quality study information for the Snake River. Several commenters provided new and substantive biological information applicable to the listing decision. Other comments provided information pertaining to further research needs and recovery planning. Such information will be useful in the development of a recovery plan. Comments of a similar nature or point are grouped for consideration and response. A summary of these issues and the Service's response to each, are discussed below.

Issue 1: One respondent believed that "... from taxonomic and morphological perspective, four of the species identified in the proposals are snails while the fifth is a limpet. Therefore the Service should substitute the term mollusks for snails in the title."

Service response: Limpet is the common and standardized term used by malacologists when referring to snails with low conical or cap shaped shells that have lost their coiled character. Specifically, the work was first applied to marine snails (gastropods=molluscs) with a non-coiled shell having an imperforate apex. This shell form is believed to have evolved separately in many different snail lineages to provide a more hydrodynamic contour in heavy currents. The Service considers use of the term "snails" to describe the subject species in the final rule both appropriate and proper.

Issue 2: Several comments addressed the question of the Banbury Springs lanx or limpet (*Lanx sp.*) status as a separate taxon. This species shows gross morphological similarity to another candidate Snake River lancid, the shortface or giant Columbia River limpet (*Fisherola nuttali*). One commenter believed that further taxonomic corroboration is needed for discriminating *Lanx* vs. *Fisherola* "... before a 'new' genus-species is recommended for endangered status." Some commenters also maintain that there has been some confusion regarding misidentifications of the Banbury Springs and *F. nuttali* from specimens collected in Box Canyon Springs (Beek 1989). Specifically, they refer to differences in species identification by Dwight Taylor and Terrence Frest for several lancid specimens from the same vial provided by Richard Konopacky.

Service response: The Service has considered available scientific evidence and concludes that the Banbury Springs lanx (*Lanx sp.*) and *F. nuttali* are distinct taxa and spatially segregated.

Shell features are the primary morphological discriminants distinguishing the Banbury Springs lanx and *F. nuttali*. These features include shell apex location and orientation, shape of the posterior and anterior side, color, maximum dimensions, and ratios of standard shell measurements (Frest 1991d). The two species are also segregated ecologically. The Banbury Springs limpet has been collected only from spring habitats at three locations and there is no evidence of its occurrence in the mainstem Snake River. *Fisherola*, on the other hand, is known to occur only in the mainstem middle Snake River and other mainstem Columbia basin rivers and has not been found in springs. Regarding the conflicting identification by Taylor and Frest of some lancid specimens collected from Box Canyon Springs, the Service notes that the differences were most likely due to confusion from using unlabeled vials. Frest (1991a) recently collected and examined several lancids from Box Canyon and also examined collections by Taylor (dead) and Konopacky (specimens in question); he concludes that only one lancid species is present, the Banbury Springs lanx.

Issue 3: Several commenters contend that the Service failed to evaluate and incorporate information in their possession prior to publication of the proposed rule. They believed that this information indicated the candidate species are more widely distributed and abundant than indicated in the Service's proposed rule and therefore the species should not be listed.

Service response: The information in question was unpublished data on snail range and distributions in the mid-Snake river collected in a study by Beek Consultants, Incorporated during 1987. Snail field data and locations for the species of interest were submitted to the Boise Field Office on February 19, 1990. According to the author of the proposed rule (Jay Gore, U.S. Forest Service, formerly Fish and Wildlife Service, pers. comm.), the information was in draft or field note form and was not easily interpretable. The Service is requested that the information be resubmitted in a form that was more easily interpretable during the open comment period following publication of the proposed rule. This information has been evaluated and incorporated into the final rulemaking process.

Issue 4: Several commenters requested that the Service delay or preclude listing the five aquatic snails because too little is known regarding their present status. They believed there was inadequate and insufficient sampling in past mollusc surveys to

describe overall distribution and abundance. For example, statements to the effect that: (1) Less than 1 percent of the middle Snake River has been sampled; (2) the proposed rule is based on earlier surveys that failed to adequately sample deepwater and other "hard to sample" habitats; and (3) recent limited surveys have located new populations, which greatly expand the "present range" of some of these species; these facts "... suggest that even very limited additional efforts will uncover new populations and that all representative habitat has not been examined." Several commenters argued against the listing asserting that sampling for molluscs exhibiting localized and discontinuous distribution using non-randomized, biased sampling (or sampling "where their previous experience and prior knowledge dictate"—Steinhorst 1992) will likely miss existing populations; therefore conclusions regarding current distribution in previous studies were not statistically valid. They also contend that failure to locate populations of molluscs exhibiting discontinuous distribution should be expected when using this type of "flawed" sampling. Several respondents also suggested that the Service initiate a comprehensive, statistically-based studies program for these species to develop additional data on spatial distribution and habitat requirements prior to any final listing decision.

Service response: The listing process includes an opportunity for the public to provide input and new information is evaluated and considered before a final determination is made. Aside from previously cited studies and reports in the proposed rule, the Service has reviewed and considered new information regarding distribution and general life history for the five candidate species for eight recent mollusc surveys in the Snake River basin. The Service used information only from sites where "live" specimens were found to evaluate and establish current geographic range. The use of dead specimens or shells to establish current range can be misleading since identification for some species may be difficult and shells are easily transported downstream. Because dead shells may persist for several years and for some taxa it is difficult to distinguish recently dead versus fossilized shells, conclusions regarding recent habitation are purely speculative. Four of the surveys examined a larger geographical area than previous studies cited in the proposed rule and only in a few instances were additional new

"live sites" found. The study by Beak (1987; referred to in Issue #3) reported a single live Snake River Physa below Minidoka dam at river mile 675 and two new live sites for the Idaho springsnail (within the historic range cited in the proposed rule). Frest (1991b) surveyed nearly 500 sites for candidate molluscs from 1988–91 throughout the Snake River and Columbia River basins, including 51 sites in the middle Snake River. Although Frest collected Bliss rapids snail, Idaho springsnail and Utah valvata snails, none of the collections were considered new live sites and none of the candidates were reported outside the middle Snake River drainage. Frest (1991d) reported evidence of recent range reduction for the candidate species based on failure to find live specimens during surveys by Beak (1987) at some of Taylor's earlier sites. Pentec (1991b) reported a new "live" population of Bliss rapids snail in the Snake River associated with spring outflows above American Falls reservoir at river mile 749.8. The report states that this "... collection of live animals (Bliss Rapids snails) increased the present range of the species upstream by 162 miles or by 486 percent relative to the present range stated in the USFWS proposal. . . ." These types of range descriptions and comparisons are valid only when species distribution is 'continuous' and not fragmented or discontinuously distributed as is the situation for these species. In any event, new live sites reported for the Bliss Rapids snail are within the historic range cited in the proposed rule, and are subject to similar habitat threats as the previously cited sites. Pentec also reported the third "new" population of Banbury Springs lanx discovered in a large spring-run at the Preserve (river mile 584.6). More recently, a limited study on the effects of reservoir drawdown on molluscs in the lower Snake River below Hells Canyon reported the absence of the five candidate species in this reach (Frest and Johannes 1992b). The authors of this study also noted the absence of other expected mollusc endemics, even the eurytopic and widespread species, from exposed shorelines in deepwater habitats in impounded reaches. In summary, no new significant distributional information affecting the status of the five taxa were reported by any respondent, and in most instances the candidate species were not collected at most sites sampled in each survey. Moreover, with the exception of *Lanx*, the surveys substantiate conclusions in the proposed rule that the candidate species are found only in the Snake

River and have declined to the point where they are now absent from vast reaches of the Snake River. Regarding the argument that the proposed listing is based on inadequate and biased sampling, the Service concurs with Felter's (1992) following summary and analysis:

"* * * non-randomized, purposeful sampling may well miss existing populations", therefore "... given suitable habitat, additional populations of these taxa might be found with more orderly, non-purposeful sampling. Statistical considerations alone do not fully answer that possibility. The sampling issue is but part of the question of whether one would expect to find additional populations of any one of these taxa. The suitability of the habitat to support the species must also be considered, i.e., unacceptable habitat renders moot the question of whether non-sampling of river habitats judged to be ecologically unacceptable for a species indicates possibility of additional habitat where the taxa might be found. The stenotopic environmental requirements of all of these taxa first delimits possible habitat for a species. Secondly, one addresses the question of adequate sampling of the potential habitat, not of all the water environment in the river, irregardless [sic] of the degree of matching organism requirements with the environment. Ecological judgement sets the bounds; statistical judgement then considers adequacy of sampling that potential habitat. The panel had no deepwater sampling data to review but the findings of recent water quality studies of absolute environmental unsuitability offered by these habitats justifies the conclusion that Gastropods, especially taxa only found in habitats very different than those presently offered by the deepwater habitats are unlikely to be found. . . ." Felter goes on to state "... The bulk of the remaining, poorly sampled Snake River does not now offer those habitat conditions" (needed by the taxa), "... so it is not potential habitat. Reasonable ecological inference correctly stratifies those latter areas out of consideration as potential habitat."

These considerations also rule out deepwater habitat by these taxa since water quality declines with depth in the middle Snake River. The Service does believe that future mollusc surveys and studies may reveal a few additional locations with live populations or colonies of the candidate species, especially in shallow, littoral areas influenced by springflows. However, it is likely that these newly discovered populations will be threatened by the same activities affecting the existing populations. The Service maintains that this final rule is based on the best information available. The Service also believes that sufficient information is provided on these five species to warrant making a determination on their status at this time.

Issue 5: Many comment letters expressed concerns with the potential economic impacts to agriculture and community development along the Snake River plain in south central Idaho from listing the five snails under the Act. For example, several commenters were concerned with the potential impacts to future hydroelectric development along the middle Snake River and constraints to existing project operations. Another respondent requested that the Service designate "... mitigation measures that would permit normal agricultural practices while still protecting the species ...".

Service response: Under section 4(b)(1)(A) of the Act, listing determinations are based solely on the best scientific and commercial information available and economic considerations are not applicable. The legislative history of the provisions clearly states the intent of Congress to "ensure" that listing decisions are "based solely on biological criteria and to prevent non-biological considerations from affecting such decisions." H.R. Rep. No. 97-835, 97th Congress 2nd Session 19 (1982). Because the Service is specifically precluded from considering economic impacts in the final rulemaking process, the Service has not addressed such impacts in this final rule.

Issue 6: One commenter was concerned with the impacts to agriculture from designating critical habitat. They requested the Service designate critical habitat during the final rulemaking process "... to avoid too large an area being designated."

Service response: Under section 4(a)(3)(A) of the Act, the Secretary must designate critical habitat to the maximum extent prudent and determinable at the time a species is determined to be threatened or endangered. In the proposed rule, the Service found that determination of critical habitat was not prudent for these species. As discussed under the "Critical Habitat" section below, the Service continues to find that designation of critical habitat for these aquatic snails is not prudent at this time. Because many of the remaining populations for these species are in localized springs, the Service believes such designation might increase the degree of collecting, vandalism, and other human activities, thus further threatening these five snails. Protection of these species' habitats will be addressed through the recovery process, and through the section 7 consultation process.

Issue 7: One respondent maintained that this issue should be decided by the

State of Idaho and not through the Federal listing process. The Service should delay listing at this time "... because the legislature and Water Resources Board have extended protection to the Middle Snake for a number of years and there is no reason that this water quality and everything can't be taken care of on a state level."

Service response: In recent years, several programs to address deteriorating water quality in the Snake River have been initiated by various State of Idaho regulatory agencies with permitting and enforcement authority (IDHW 1991 a and b). One of the first of these programs was a water quality monitoring study launched in 1990 by the Division of Environmental Quality (DEQ). That same year the Snake River from Shoshone Falls downstream to Lower Salmon Falls Reservoir was listed as "water quality limited." This determination requires that DEQ develop a Total Maximum Daily Load (TMDL) for the river which quantifies pollutant sources and allocates nutrient loads. In a related matter, the DEQ recently denied certification for a National Pollution Discharge Elimination System (NPDES) permit for a new fish rearing facility in the middle Snake River area. The decision was based on DEQ's interim policy of no net increase in total nutrients discharged into the Snake River prior to development of the TMDL. Passage of the Nutrient Management Act passed by the Idaho Legislature in 1989 requires the DEQ to complete a nutrient management plan for the Snake River by 1993. The Idaho Department of Water Resources is involved in planning efforts which could result in State "protected" status for all or portions of this stretch of river. Such designation would protect "outstanding fish and wildlife, recreational, aesthetic, historical, cultural, natural or geological values * * * for the public benefit and enjoyment" from certain activities and could preclude further hydro development. At present, the stretch from below Milner Dam downstream to King Hill is under interim protected status through 1993. Despite these and other programs initiated to halt the deterioration of the middle Snake River, most are in the early stages, and it is unlikely these programs will reverse the trend any time soon. In any event, regulations that provide protection for invertebrate species equivalent to provisions of the Federal Endangered Species Act do not currently exist in Idaho. The Idaho Department of Fish and Game does maintain a list of wildlife classified as Threatened and

Endangered and/or Protected Nongame species that prohibits take or possession. However this protection does not extend to any non-vertebrate species. See the discussion under Factor D in "Summary of Factors Affecting the Species" for a complete discussion on the inadequacy of existing regulatory mechanisms for the Idaho springsnail, Utah valvata snail, Snake River Physa, Banbury Springs lanx and Bliss rapids snail.

Issue 8: One commenter requested that the Service prepare as part of the final rule a Takings Implications Assessment under Executive Order 12630 to evaluate the risk and strategies for the avoidance of the taking of private property.

Service response: Concerning Executive Order 12630, "Governmental Actions and Interference with Constitutionally Protected Property Rights" (March 15, 1988), the Attorney General has issued guidelines on implementation of the Executive Order. Under the supplemental guidelines for the Department of the Interior, a "special situations" rule applies when an agency is expressly required to take an action, making a finding, or give consultation based solely upon specified criteria that leave the agency no discretion; such as the criteria outlined in the Endangered Species Act (Act) for the listing of species. The Attorney General's supplemental guidelines state that Taking Implication Assessments (TIA) shall be prepared after, rather than before, the agency makes the decision upon which its discretion is restricted. The purpose of TIAs in these special circumstances is to inform policymakers of areas where unavoidable taking exposures exist. Such TIAs shall not be considered in the making of administrative decisions that must, by law, be made without regard to their economic impact. Provisions of the Act require the Service to list species based solely on the best scientific and commercial information indicating whether or not they are in danger of extinction. The Service may not consider economic impacts in making a listing decision. The listing process is also subject to strict timetables and failure to comply may subject the agency to legal action. The provisions of the supplemental guidelines relating to non-discretionary actions are applicable to the determination of threatened and endangered status for the five snail species that are subject of this final rule.

Issue 9: Two respondents claim that the Service has "overstated" the threats to the species from various activities. Specifically, assertions in the proposed

rule that describe adverse impacts to the subject species such as "The species are threatened by proposed large hydroelectric dam developments, current peak-loading operations of existing hydroelectric water projects, water pollution, reduction in oxygen concentration, and possibly competition from a recently introduced hydrobiid snail" are "... conclusory, giving no evidence or analysis or citation for support."

Service response: Despite the above claims, no new information was provided to contradict the Service's contention that the five species are threatened by deteriorating water quality and other threats present in the middle Snake River (see Factor A in "Summary of Factors Affecting the Species"). New information submitted during the comment period reaffirmed that the snails are coldwater stenotopic species restricted to the middle Snake River with localized distribution, and absent from impounded reaches. Most of this information was found in eight mollusc surveys undertaken from 1987-1992 at various locations throughout the Snake River Basin (Beak 1987, Beak 1989, Frest 1991b, Frest and Johannes 1991, Frest and Johannes 1992a, Frest and Johannes 1992b, Pentec 1991b, and Taylor 1987). Although range extensions were noted for Utah valvata and Bliss Rapids snails in some of the surveys, sites where these and the remaining three species were collected occurred only in 'preferred or usable' habitat types. In fact, snails were absent from most sites and locations sampled in each survey. Frest and Johannes (1992a) noted declines in abundance and distribution of Utah valvata in the Conservancy's Preserve, a "protected area", due to water quality problems attributed to agricultural and aquaculture return flows initiated outside the Preserve's boundaries. Taylor (1985a) stated that diversion of a portion of Box Canyon Creek to the Clear Springs Trout Hatchery in the fall of 1973 "substantially impacted populations of Bliss Rapids snails" downstream in the Bureau of Land Management's Box Canyon Area of Critical Environmental Concern. He also noted that the diversion possibly enhanced habitat for Utah valvata snails through flow velocity reduction. Since the stenotopic environmental requirements of these species defines suitable habitat, most malacologists agree that impounding remaining free-flowing reaches would be devastating to four of the five species. Impoundment would inundate existing habitat, reduce vital shallow shoreline habitats in

tailwater areas due to operating flow fluctuations, elevate water temperatures, reduce dissolved oxygen levels in sediments, modify the rivers ability to assimilate point and non-point source pollution, and further fragment remaining populations. Frest and Johannes (1991) acknowledged that proposed construction of diversion dams for power production at Kanaka, Empire, and Boulder Rapids, river miles 592.2, 594.5, and 597.5, respectively, would not impact Utah valvata or any other candidate species because the taxa no longer occur in that river reach. The authors attributed the snails absence to deteriorating water quality and emphasized that this stretch of the river was becoming marginal mollusc habitat for the remaining native species. In addition, the recent low flows associated with the prolonged drought in southeast Idaho have contributed to continuing water quality problems throughout the Snake River basin. The Service, however, does believe that Physa and Bliss Rapids snail would benefit from stabilized, non-fluctuating water levels in the Lower Salmon Falls and Bliss Dam tailwater reaches. As discussed in detail in the "Summary of Factors Affecting the Species" section, the Service concludes that nearly all of the remaining populations of the five snails are at risk.

Summary of Factors Affecting the Species

After a thorough review and consideration of all information available, the Service has determined that the Idaho springsnail (*Pyrgulopsis idahoensis*), Utah valvata snail (*Valvata utahensis*), Snake River Physa snail (*Physa natricina*), and Banbury Springs lanx (*Lanx n. sp.*) should be classified as endangered species and the Bliss Rapids snail (Family Hydrobiidae, n. sp.) should be listed as a threatened species. Procedures required by section 4 of the Act and regulations (50 CFR part 424) promulgated to implement the listing provisions of the Act were followed. Under the Act, a species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1). These factors and their application to the Idaho springsnail, Utah valvata snail, Snake River Physa snail, Bliss Rapids snail, and the Banbury Springs lanx are as follows:

A. The present or threatened destruction, modification, or curtailment of its habitat or range. Activities that could further threaten the continued existence of the Bliss Rapids snail, Utah valvata snail, Idaho springsnail, Banbury Springs lanx, or

Snake River Physa snail include proposed large hydroelectric dam developments, peak-loading operations of existing hydroelectric water projects, water pollution, diversion of water for irrigation and aquaculture and small hydroelectric development.

Six proposed hydroelectric projects, including two high dam facilities, would alter free flowing river reaches within the existing range of these snails. Dam construction threatens the five taxa through direct habitat modification and moderates the Snake River's ability to assimilate point and non-point pollution. Further hydroelectric development along the Snake River would inundate existing mollusc habitats through impoundment, reduce critical shallow, littoral shoreline habitats in tailwater areas due to operating water fluctuations, elevate water temperatures, reduce dissolved oxygen levels in impounded sediments, and further fragment remaining mainstem populations or colonies of these snails.

The Idaho Power Company studied the feasibility of additional hydro development in the area during the early 1980's, and the Federal Energy Regulatory Commission (Commission) denied the Company's license requests when a mid-1980's power supply needs analysis revealed that the Northwest United States would have a power surplus into the early 1990's. However, the rapidly growing Northwest region is forecasting power shortages by the late 1990's and interest in developing potential hydro sites on the Snake River is on the rise.

Currently, Idaho Power Company has received a preliminary permit to evaluate the development and operation of the A.J. Wiley hydropower project (Federal Energy Regulatory Commission No. 11020) at river mile 565 on the lower Salmon Falls Dam tailwater. The reservoir created by this project would extend approximately six river miles to the tailwaters of the existing lower Salmon hydroproject and impound approximately 625 surface acres. This impoundment would inundate and destroy mainstem river habitats for existing populations of Snake River Physa and Bliss Rapids snail. Dike Hydroelectric Partners, (Federal Energy Regulatory Commission No. 10891) is currently evaluating another location, the Bliss Dam tailwaters at river mile 552, for hydropower development. This project would include construction of a large compacted concrete dam creating a 560-acre reservoir. This development would inundate existing habitat and populations of the Idaho springsnail, the Bliss Rapids snail, and the Snake River

Physa snail that occur near Bancroft Springs. Construction of these two proposed dams would inundate four mainstem sites that are currently supporting populations of the Bliss Rapids snail; both of the two known sites that are currently supporting populations of the Snake River Physa snail, and at least one known population of the Idaho springsnail. These two proposed dams would not inundate habitat for the Utah valvata snail since this snail is well upstream. The Banbury Springs lanx occurs in three tributary springs that flow into the Snake River and these would likely not be impacted by the two dams. The remaining four proposed hydro projects are diversion or run-of-river developments (without reservoirs) that would alter the flow regime and minimize annual flows in the bypass reaches at the four Snake River sites. Frest and Johannes (1991) believe that proposed construction and operation of three of these projects for power production, Kanaka, Empire and Boulder Rapids would not adversely impact the Utah valvata or any other candidate, so long as efforts to control sedimentation during construction are implemented. Deteriorating water quality is most likely the primary factor limiting the native molluscs in this reach. Even with improvements in water quality in this reach of the Snake River, construction of these projects would affect recovery efforts since otherwise suitable free-flowing habitats would be impacted.

Peak-loading, the practice of artificially raising and lowering river levels to meet short-term electrical needs by local run-of-the-river hydroelectric projects also threatens these species. Peak-loading is a frequent and sporadic practice that results in dewatering mollusc habitats in shallow, littoral shoreline areas. With the exception of the Banbury Springs lanx and possibly Snake River physa, these diurnal water fluctuations prevent the candidate species from occupying the most favorable habitats. The Bliss Dam is approximately six miles above Bancroft Springs and may adversely affect three known populations of the Idaho springsnail, two populations of the Bliss Rapids snail, and a population of the Snake River Physa snail, by restricting littoral habitat during the late summer peak-loading operation. Peak-loading operation of the lower Salmon Falls Power Plant may harm three mainstem Snake River populations of the Bliss Rapids snail, and a population of the Snake River Physa snail. The combined peak-loading effects from

proposed A.J. Wiley and Dike hydroelectric projects would also impact known populations of the Idaho springsnail, most of the extant colonies of the Bliss Rapids snail, and both of the Snake River Physa snail populations in the Hagerman and King Hill reaches. The recently discovered population of Bliss Rapids snail above American Falls (river mile 749.8) is also subject to the effects of water fluctuations from operation of the Shelley hydroelectric project at river mile 783.

Based on limited sampling, these snails have not been found between Milner Dam (river mile 639.1) and Shoshone Falls (river mile 614.8). This reach of the Snake River is essentially dewatered during the irrigation season and remaining low flows have poor water quality. It is unlikely that these species could exist in this river stretch. During the irrigation season water quality and quantity below Shoshone Falls is poor, though both are gradually improved by inflow from Snake River Plain Spring tributaries through the Hagerman Reach.

The quality of water in these habitats has a direct effect on the species survival. The species require cold, well-oxygenated unpolluted water for survival. Any factor that leads to a deterioration in water quality would likely extirpate these taxa. For example, the Banbury Springs lanx lacks either lungs or gills and respire through unusually heavy vascularized mantles. This species cannot withstand temporary episodes of poor water quality conditions. Because of its stringent oxygen requirements, any factor that reduces dissolved oxygen contact for even a few days would very likely prove fatal to most or all of the populations. Factors that would degrade water quality include reduction in flow rate, warming, and increases in the concentration of fertilizers, herbicides or pesticides from irrigation waste water return. The middle Snake River is impacted by return flows from irrigated agriculture, runoff from feedlots and dairies, hatchery effluent, municipal sewage effluent, and other point and non-point discharges. During the irrigation season, 13 perennial streams and more than 50 agricultural drains contribute irrigation tailwater to the Snake River (IDHW, 1991b). In addition, more than 140 commercial, State and Federal fish culture facilities discharge wastewater into the Snake River and its tributaries. These factors, coupled with drought-induced low flows, contribute to the increased eutrophication and general decline of the coldwater lotic molluscs of the middle Snake River. Water quality in the alcove springs and

tributary spring streams in the Hagerman Reach have also been somewhat impacted, though not as severely as the mainstem river has. The Hagerman Reach receives massive cold water recharge from the Snake River Plain Aquifer. Several of these springs and spring tributaries have been diverted for hatchery water supplies with return flows to the Snake River enriched with nutrients. At the Conservancy's Preserve at Thousand Springs, there is evidence that colonies of Utah valvata and Bliss Rapids snail have recently declined or been eliminated at several sites from changes in water quality due to agricultural and aquaculture wastewater originating outside the area (Frest and Johannes 1992a).

Four tributary springs or spring streams of the Hagerman area of the Snake River—Banbury Springs, Box Canyon Springs, Thousand Springs and Sand Springs Creek—contain populations of two or more of the taxa described in this rule. The Banbury Springs lanx is found in only three of these tributary springs: Banbury, Box Canyon and Thousand Springs. The Utah valvata and Bliss Rapids snail occur in Box Canyon, Thousand Springs and the mainstem Snake River. Banbury Springs has no known threats, but Box Canyon Springs is threatened by a small hydroelectric project at the upper end of Box Canyon and a water diversion dam at the lower end of Box Canyon. The upper two-thirds of Box Canyon, including the water diversion is privately owned. The stream and associated area below the diversion is owned by the Bureau of Land Management (BLM) and was designated an Area of Critical Environmental Concern (ACEC) in 1986. The ACEC was established to manage habitats for three candidate molluscs, the Bliss Rapids snail, Utah valvata, and *Fisherola nuttalli*, and the Shoshone sculpin (*Cottus greenei*). Lanx (Banbury Springs lanx) was added to the list of sensitive species under ACEC management with the discovery of the second of three populations of this species in the Sculpin Pool at Box Canyon in 1989 (Beak 1989). Construction of a diversion dam for a trout culture facility in upper Box Canyon in 1973 eliminated habitat of the Bliss Rapids snail, though Taylor (1985a) reported that sediment produced as a result of constructions enhanced habitat for Utah valvata downstream in the natural pool on BLM lands. Ground water mining or withdrawal may also impact spring stream habitats of the "new" Bliss Rapids snail population above

American Falls Reservoir at river mile 749.8. Biologists of the Shoshone Bannock Tribal Reservation have observed water fluctuations and seasonal declines in spring flows along this stretch of the Snake River concurrent with the irrigation season (Doug Takai, biologist, Shoshone Bannock Tribal Reservation, pers. comm.). Though not fully documented, these seasonal declines in spring flows seem more pronounced in recent years due to ongoing drought conditions.

Winter cattle grazing and recreational access may also be impacting spring habitats of the Bliss Rapids snail on the Shoshone Bannock Reservation. Although access is controlled, waterfowl hunters, and to some extent fishermen, utilize these spring areas throughout the Fall and early Winter. The Service believes trampling by cattle and people will likely produce minimal impacts to spring habitats.

In summary, the cumulative effects of these factors combined with extreme low flows throughout much of the Snake River from over five years of drought, continue to threaten the remaining habitats and increasingly fragmented populations of these five species. This is especially true for habitats and extant populations in the mainstem Snake River.

B. Overutilization for commercial, recreational, scientific, or educational purposes. Not known to be applicable. However, due to their rarity, some of these taxa may have been subject to past overutilization for scientific purposes. For example, of the less than fifty live Snake River Physa snails collected in the middle Snake River, nearly all were preserved or killed for scientific purposes. In other instances, some molluscs have become vulnerable to illegal collection for scientific purposes following listing under the Act.

C. Disease or predation. Changes in the fish fauna of the middle Snake River have been suggested as potentially threatening to some or all of the candidate taxa. However, no data to support this suggestion exists. Fish predation was not considered a "major problem" for these taxa in a recent mollusc survey at The Nature Conservancy's Preserve (Frest and Johannes 1992a).

D. The inadequacy of existing regulatory mechanisms. The Idaho Department of Water Resources regulates water development in the Snake River basin. At present, there is no specific allocation of water on the mainstem middle Snake River for fish and wildlife, although maintenance flows for fish and wildlife on several tributary streams to the Snake River

have been established. Without Federal protection under the Act, present management regulations are inadequate to curb further water withdrawal from groundwater spring outflows or tributary spring streams.

Changes in the use of stored water in the Snake River basin to assist recovery efforts for other threatened and endangered species may also impact these species and their habitats. For example, the Bonneville Power Administration, State of Idaho, and Idaho Power Company are exploring alternatives to assist outmigrating endangered Snake River sockeye salmon (*Oncorhynchus nerka*) and threatened spring and summer chinook (*Oncorhynchus tshawytscha*) from utilizing water from the upper Snake River basin.

The Idaho Department of Health and Welfare, Division of Environmental Quality, under authority of the State Nutrient Management Act, is coordinating efforts to identify and implement preventative actions which will reduce nutrient loading to the middle Snake River below Milner Dam (IDHW 1991b). These efforts will address pollution control strategies for this stretch of river through several of the following program areas: State Agricultural Water Quality Program, NPDES permits, 401 Certification, Bureau of Land Management land management plans, the State Water Plan and local ordinances. Despite these efforts to better comprehend and halt the deterioration of the middle Snake River, it is unlikely these programs will reverse the trend any time soon, since it will be several years before any recommendations to improve water quality outlined in comprehensive resource management plans for the Snake River are fully implemented.

There are at least two State agencies that have as part of their goals and objectives the identification and protection of rare taxa and their habitats. The Idaho Parks and Recreation has authority under Idaho Code section 18-3913, 1967, to protect only plants, with animals not given special protection on Idaho lands. The Department of Fish and Game, under Idaho Code section 36-103, is mandated to preserve, protect, perpetuate, and manage all wildlife. However, these mandates do not extend protection to invertebrate species.

The Federal Energy Regulatory Commission (Commission) is the agency responsible for issuing licenses for hydroelectric projects. The Commission solicits input from the Service regarding environmental impacts that may result from proposed projects. The Service's

comments regarding impacts to "candidate" only species, such as the five aquatic snails, are advisory in nature. The Commission relies upon the developer and the Service to resolve issues with respect to candidate species. Without listing, it is unlikely that the Commission would require a project proponent to mitigate for impacts to these species unless the developer did so voluntarily. Consequently, the Commission's review of projects does not provide protection to the five taxa covered in this rule.

The U.S. Army Corps of Engineers (Corps) is also involved in the permitting of projects on the Snake River through their authority under section 404 of the Clean Water Act. The Corps issues individual and nationwide permits for projects that would result in the fill of waters of the United States. Nationwide permits are often issued for relatively small projects (hydroelectric projects producing less than 5 megawatts and some bridge crossings) that presumably have minimal environmental impacts. Projects requiring individual permits undergo more extensive environmental review and the permits often include conditions that require avoidance or mitigation for environmental impacts. Virtually any project within the range of these molluscs would require an individual permit as described in section 404 of the Clean Water Act. The Corps does solicit input from the Service regarding impacts to wildlife resources. The Corps gives full consideration to the Service's comments on permits. However, the Service's comments regarding candidate species are advisory. In practice, the Corps does not give any special consideration to the five invertebrates considered herein.

With the listing of these species as threatened or endangered, the Corps and the Commission will be required to initiate formal consultation pursuant to section 7 of the Act on any project that may affect one or more of these species. Such consultation would result in a Biological Opinion on whether or not the project proposed to be authorized is likely to jeopardize the continued existence of the species. With listing, both the Commission and Corps will be required to insure that any project they authorize will not be likely to jeopardize the continued existence of these species. Conditions that would provide protection to the species could be incorporated into permits or licenses issued. The provisions of section 7 of the Act are more fully discussed later in this proposed rule.

E. Other natural or manmade factors affecting their continued existence.

Although not fully understood, an introduced hydrobiid snail, the New Zealand mudsnail (*Potamopyrgus antipodarum* (= *P. jenkinsi*)) may complicate survival for these native species. This non-native species occurs throughout the range of the five species included in this rule (Bowler 1989a, 1989b, 1990). This hydrobiid snail is native to New Zealand and has also spread to Europe and Australia. *Potamopyrgus antipodarum* was first reported in the middle Snake River in 1987, when Taylor found the species had invaded several alcove spring habitats at The Nature Conservancy's Preserve. This exotic taxa may have been inadvertently introduced by the private aquaculture industry in this area. By December, 1988, *P. antipodarum* was the dominant taxa in the free-flowing habitats of the Hagerman Reach below Bliss Dam (Bowler 1990). It formed dark mats of individuals in habitat formerly preferred by native species including the Bliss Rapids snails and Snake River Physa. The species has been observed at densities of nearly 400 individuals per square inch. *Potamopyrgus* is parthenogenic and ovoviparous, which contributes to the ability to build large populations rapidly and recover from population crashes. The species is eurytopic and shows very little preference for substrate type or size. The mudsnail is much more abundant in the mainstem Snake River than in cold spring environments; it is uncommon or absent in both unimpacted, pristine or stagnant, highly polluted environments (Frest and Johannes 1992a). At present, *Potamopyrgus* is not abundant in large springs inhabited by *Lanx n. sp.* and in cold springflows with colonies of Bliss Rapids snail and Utah valvata. The species does, however, compete for habitat with Snake River Physa and Idaho springsnail and mainstem colonies of Bliss Rapids snail and Utah valvata. *Potamopyrgus* is abundant in the Snake River below Bliss Dam to C.J. Strike Reservoir and inhabits the same littoral sand/silt substrate as the Idaho springsnail (Bowler 1990). In addition, the species forms "thick mats" of individuals at mainstem locations with Snake River Physa and Bliss Rapids snails. Potential threats to the subject species and other native molluscs include crowding and competition for preferred habitat for mainstem populations, and possible attraction and support of molluscivorous fish and avian predators (Bowler 1990). Although no information exists regarding foraging, it is possible that competition for forage may occur in

areas where preferred habitats are limiting i.e., boulder substrate is limited. In summary, *Potamopyrgus* appears to impact most directly mainstem populations of the candidate taxa. At present, it does not appear to threaten spring populations of *Lanx n. sp.*, Bliss Rapids snail and Utah valvata. The New Zealand mudsnail is still expanding its range and population in the Snake River. Further research on *Potamopyrgus* is required to monitor its expansion and to fully comprehend its full impact to the native molluscs and the overall ecology of the Snake River.

Determination

The Service has carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by these species in determining to issue this rule. Based on this evaluation, the preferred action is to list the Idaho springsnail (*Pyrgulopsis idahoensis*), Utah valvata snail (*Valvata utahensis*), Snake River Physa snail (*Physa natricina*), and the Banbury Springs *lanx* (*Lanx n. sp.*) as endangered and the Bliss Rapids snail as threatened. With the exception of *Lanx*, four of the taxa have declined over all but a small fraction of their historical range. Today these species generally persist in a few isolated free-flowing reaches or spring alcove habitats in the middle Snake River characterized by cold well-oxygenated unpolluted water. *Lanx* has remained relatively stable within its three known locations since its discovery in 1988. However, because *Lanx* is known only from three locations it is most vulnerable to habitat change. The free-flowing, cool water environments required by these species have been impacted by and are vulnerable to continued adverse habitat modification and deteriorating water quality. This is especially true for those species restricted to mainstem river environments, the Snake River Physa and Idaho springsnail, but also mainstem colonies of Bliss Rapids snails and Utah valvata. These mainstem species may also be vulnerable to habitat competition from an exotic snail. With the exception of spring habitats at The Nature Conservancy's Preserve, remaining pristine spring and spring stream complexes preferred by *Lanx*, Bliss Rapids snail and Utah valvata are not protected from all threats previously discussed. Existing regulations do not provide adequate protection to prevent further direct and indirect habitat losses. Because the Idaho springsnail, Utah valvata, Snake River Physa, and Banbury Springs *lanx* are in danger of extinction throughout all or a significant

portion of their ranges, they fit the definition of endangered as defined in the Act.

The Bliss Rapids snail is the most widespread of the five taxa, with new live populations recently reported above American Falls reservoir in springflow habitats. It is most abundant in several cold springs in the Hagerman Reach, and enjoys some degree of protection in several unpolluted springs on The Nature Conservancy's Preserve at Thousand Springs. The number of extant populations, including those on the Preserve, provides greater flexibility in recovery and reduces the likelihood that the Bliss Rapids snail will go extinct in the immediate future. However, remaining mainstem populations are variously threatened. Because of the limited threats facing the Preserve colonies of Bliss Rapids snails and the likelihood that limited additional populations may be found in spring habitats, this species is not now in immediate danger of extinction throughout all or a significant portion of its range. However, the Bliss Rapids snail is likely to become in danger of extinction in the near future. As a result, the Bliss Rapids snail fits the definition of threatened species as defined in the Act.

For reasons discussed below, critical habitat is not being proposed at this time.

Critical Habitat

Section 4(a)(3) of the Act requires, to the maximum extent prudent and determinable, that the Secretary designate critical habitat at the time a species is determined to be endangered or threatened. The Service has determined that critical habitat designation for these species is not presently prudent. Some populations are in localized springs and over-collecting by malacologists or vandalism could occur if their whereabouts were widely known. Regulations implementing section 4 of the Act provide that a designation of critical habitat is not prudent when a species is threatened by taking or other human activity and identification of critical habitat can be expected to increase the degree of such threat (50 CFR 424.12). Protection of these species' habitat will be addressed through the recovery process and through the section 7 consultation process. The Service believes that Federal involvement in the areas where these snails persist can be identified without the designation of critical habitat. Therefore, it would not now be prudent to determine critical habitat for these species.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain activities. Recognition through listing encourages and results in conservation actions by Federal, State, and private agencies, groups and individuals. The Act provides for possible land acquisition and cooperation with the States and requires that recovery actions be carried out for all listed species. The protections required of Federal agencies and the prohibitions against taking and harm are discussed, in part, below.

Section 7(a) of the Act, as amended, requires Federal agencies to evaluate their actions with respect to any species listed as endangered or threatened and with respect to its critical habitat, if any is being designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR Part 402. Section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any action that is likely to jeopardize the continued existence of a threatened or endangered species or result in destruction or adverse modification of proposed critical habitat. If a species is listed subsequently, section 7(a)(2) requires Federal agencies to insure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service.

Federal actions that may be affected by this final rule include the granting of licenses by the Commission for hydroelectric/power dam development and the issuing of permits under section 404 of the Clean Water Act by the Corps. The Commission will likely be required to consult with the Service on the previously mentioned hydroelectric/power dam proposals (A.J. Wiley, Idaho Power Company and Dike Hydroelectric Company). The Corps and Bureau of Land Management will likely be required to consult with the Service on the Box Canyon water diversion dam. In addition, joint consultation by the Corps and the Commission with the Service may be necessary if any of the projects under licensing consideration by the Commission include plans for filling. Federal or federally assisted programs affecting potential Snake River Plain Aquifer recharge programs and the

Environmental Protection Agency's NPDES program would also be subject to consultation under section 7(a)(2).

The Act and implementing regulations found at 50 CFR 17.21 and 17.31 set forth a series of general prohibitions and exceptions that apply to all endangered wildlife, and to all threatened wildlife not covered by a special rule. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to take (including harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect or attempt any such conduct), import or export, transport in interstate or foreign commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any endangered species, or any threatened species not covered by a special rule. It also is illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to agents of the Service and State conservation agencies.

Permits may be issued to carry out otherwise prohibited activities involving endangered or threatened wildlife species under certain circumstances. Regulations governing endangered species permits are at 50 CFR 17.22 and 17.23. Such permits are available for scientific purposes, to enhance the propagation or survival of the species, and/or for incidental take in connection with otherwise lawful activities. Regulations governing permits for threatened species are at 50 CFR 17.32. Unless otherwise provided by a special rule, such permits are available for scientific purposes, to enhance the propagation or survival of the species, for economic hardship, zoological exhibition, educational purposes, special purposes consistent with the Act, and/or for incidental take in connection with otherwise lawful activities.

National Environmental Policy Act

The Service has determined that an Environmental Assessment, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act of 1973, as amended. A notice outlining the Service's reasons for this determination was published in the *Federal Register* on October 25, 1983 (48 FR 49244).

References Cited

- Beak Consultants, Inc. 1987. Field data, findings, and locations of five mollusc species of special concern between RM 513 and RM 712 of the Snake River, Idaho. Unpublished report. Portland, Oregon.
- Beak Consultants, Inc. 1989. Limpet survey in two sections of Box Canyon Creek, Gooding County, Idaho. Prepared for Box Canyon Trout Company, Boise, Idaho.
- Bowler, P.A. 1989a. Additional information letter dated January 26, 1989, to Charles Lobdell, U.S. Fish and Wildlife Service, Boise, Idaho, with attachment on *Potomopyrgus jenkinsi*. 5 pp.
- Bowler, P.A. 1989b. Letter dated May 15, 1989, to Robert Smith, U.S. Fish and Wildlife Service, Portland, Oregon. 1 pp.
- Bowler, P.A. 1990. The rapid spread of the freshwater hydrobiid snail *Potomopyrgus antipodarum* (Gray) in the Middle Snake River, Idaho. In Pister, E.P. (ed.). Proceedings of the Desert Fishes Council 21: 173-182.
- Call, R.E. 1884. On the Quaternary and Recent Mollusca of the Great Basin, with descriptions of new forms. U.S. Geol. Survey Bull. 11, 64 pp.
- Clarke, A.H. 1992. Research summary submitted to the Utah Field Office, U.S. Fish and Wildlife Service. 4 pp. Part of an information packet submitted to the Boise Field Office, January 24, 1991.
- Falter, C. Michael. 1992. Review of technical issues relevant to listing of five taxa of Snake River molluscs under the Federal Endangered Species Act of 1973. Report to the Boise Field Office, March 24, 1992, 61 pp.
- Frest, T.J. 1989a. Affidavit of Terrence J. Frest, Civil No. 89-1233. In the United States District Court for the District of Idaho. V. Boise, 6pp. plus map.
- Frest, T.J. 1989b. Letter dated May 11, 1989 to Robert Smith, U.S. Fish and Wildlife Service, Portland Oregon, containing status information on Snake River Snails. 2 pp. with attachment.
- Frest, T.J. 1991a. Letter dated December 4, 1991 to Micheal Falter, Department of Fish & Wildlife Resources, University of Idaho, Moscow, Idaho, containing taxonomic information on the Banbury Springs Limpet. 10 pp with attachment.
- Frest, T.J. 1991b. Survey of Columbia River basin streams for candidate mollusc species *Fisherola nuttali* and *Fluminicola columbiana*. Final Report to the Department of Energy, Battelle Northwest, Richland, Washington. 54 pp.
- Frest, T.J. 1991c. Statement presented at Public Hearing on April 3, 1991, Boise, Idaho, containing information on the distribution, ecology, and history of the five candidate species.
- Frest, T.J. 1991d. Letter dated June 2, 1991 to Jay Gore, U.S. Fish and Wildlife Service, Boise, Idaho, containing a review of Beak and Pentec snail surveys and studies. 16 pp.

- Frest, T.J. and E.J. Johannes. 1991. Mollusc fauna in the vicinity of three proposed hydroelectric projects on the middle Snake River, Central Idaho. Final Report prepared for Don Chapman Associates, Inc. Boise, Idaho. 57 pp.
- Frest, T.J. and E.J. Johannes. 1992a. Distribution and ecology of the endemic relict mollusc fauna of Idaho TNC's Thousand Springs Preserve. Final Report to the Idaho Nature Conservancy, Sun Valley, Idaho. 291 pp.
- Frest, T.J. and E.J. Johannes. 1992b. Effects of the March, 1992 drawdown on the freshwater molluscs of the lower Granite Lake area, Snake River, S.E. WA and W. ID. Final report to the U.S. Army Corps of Engineers, Walla Walla, WA. 11 pp.
- Frest, T. J., P. A. Bowler, and R. Hershler. 1991. The ecology, distribution, and status of relict Lake Idaho mollusks and other endemics in the middle Snake River. Draft Manuscript.
- Gregg, W. O. and D. W. Taylor. 1965. *Fonticella* (Prosobranchia: Hydrobiidae), a new genus of West American freshwater snails. *Malacologia* 3(1):103-110.
- Hershler, R. and F. G. Thompson. 1987. North American Hydrobiidae (Gastropoda: Rissoacea): redescription and systematic relationships of *Tryonia* Stimpson, 1865 and *Pyrgulopsis* Call & Pilsbry, 1886. *The Nautilus* 101: 25-32.
- Idaho Department of Health and Welfare. 1991a. Division of Environmental Quality: Middle Snake River update. October, 1991. 4 pp.
- Idaho Department of Health and Welfare. 1991b. Division of Environmental Quality: problem assessment for the Middle Snake River, from Shoshone Falls to Lower Salmon Falls. 25 pp.
- Pentec Environmental, Inc. 1991a. Critical review of the U.S. Fish and Wildlife Service proposal to list five molluscs in the Snake River, Idaho, as endangered species. Final Report prepared for Bart M. O'Keefe, C.E. 20 pp.
- Pentec Environmental, Inc. 1991b. Distribution survey of five species of molluscs, proposed for endangered status, in the Snake River, Idaho during March 1991. Final Report prepared for the Idaho Farm Bureau, Boise, Idaho. 22 pp.
- Pilsbury, H. A. 1933. Amnicolidae from Wyoming and Oregon. *Nautilus* 47: 9-12, pl. 2.
- Steinhorst, K. 1992. Letter dated March 3, 1992 to Michael C. Falter, University of Idaho. Chairman, technical review committee. 2 pp.
- Taylor, D. W. 1966. Summary of North American blanch nonmarine mollusks. *Malacologia* 4(1): 1-172.
- Taylor, D. W. 1982a. Status report on Bliss Rapids snail. Fish and Wildlife Service. 8 pp. Portland, Oregon.
- Taylor, D. W. 1982b. Status report on Utah Valvata snail. U.S. Fish and Wildlife Service, Portland, Oregon. 10 pp.
- Taylor, D. W. 1982c. Status report on Snake River Physa snail. U.S. Fish and Wildlife Service, Portland, Oregon. 8 pp.
- Taylor, D. W. 1982d. Status report on Homedale Creek springsnail. U.S. Fish and Wildlife Service, Portland, Oregon. 10 pp.
- Taylor, D. W. 1985a. Candidate threatened or endangered molluscs in Box Canyon ACEC, Gooding County, Idaho. Report to the Bureau of Land Management, Shoshone, Idaho, dated September 5, 1985. 19 pp.
- Taylor, D. W. 1985b. Evolution of freshwater drainages and molluscs in western North America. Pp. 265-321. in C. J. Holcutt and A.B. Leviton (eds.) *Late Cenozoic History of the Pacific Northwest*, AAAS. California Academy of Sciences, San Francisco. 417 pp.
- Taylor, D. W. 1987. Thousand Springs threatened or endangered snails. Unpublished report submitted to The Nature Conservancy. 2 pp.
- Taylor, D. W. 1988. New species of *Physa* (Gastropoda: Hygrophila) from the western United States. *Malacological Review* 21:43-79.
- Walker, B. 1902. A revision of the carinate Valvatas of the United States. *Nautilus* 15:121-125.

Author

The primary author of this final rule is Stephen D. Duke, Boise Field Office (see ADDRESSES section).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, and Transportation.

Regulation(s) Promulgation

PART 17—[AMENDED]

Accordingly, part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, is amended as set forth below:

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361-1407; 16 U.S.C. 1531-1544; 16 U.S.C. 4201-4245; Public Law 99-625, 100 Stat. 3500; unless otherwise noted.

2. Amend § 17.11(h) by adding the following, in alphabetical order under Snails to the List of Endangered and Threatened Wildlife:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
Snails							
Limpet, Benbury Springs	<i>Larix n. sp.</i>	U.S.A. (ID)	NA	E	485	NA	NA
Snail, Bliss Rapids	Family Hydrobiidae n. sp.	U.S.A. (ID)	NA	T	485	NA	NA
Snail, Snake River Phrysa	<i>Phrysa natricina</i>	U.S.A. (ID)	NA	E	485	NA	NA
Snail, Utah velveta	<i>Velveta utahensis</i>	U.S.A. (ID)	NA	E	485	NA	NA
Springenail, Idaho	<i>Pyrgulopsis idahoensis</i>	U.S.A. (ID)	NA	E	485	NA	NA

Dated: November 25, 1992.

Richard N. Smith,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 92-30174 Filed 12-11-92; 8:45 am]

BILLING CODE 4310-55-M

Monday
December 14, 1992

Head Start Program

Part IV

Department of Health and Human Services

Administration for Children and Families

45 CFR Part 1303

Head Start Program; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

45 CFR Part 1303

RIN 0970-AB00

Head Start Program

AGENCY: Administration on Children, Youth and Families (ACYF), Administration for Children and Families (ACF), HHS.

ACTION: Final rule.

SUMMARY: The Administration on Children, Youth and Families is issuing this final rule to revise and clarify for Head Start grantees and delegate agencies the requirements concerning appeals by grantees from termination and denial of refunding actions. This final rule also includes provisions on appeals by current or prospective delegate agencies of grantees' rejections of, or failures to act on, applications, or grantees' terminations of grants or contracts.

The new procedures will reduce reporting and paperwork requirements. The changes also remove unnecessary and duplicative provisions and revise the language of the current regulation for clarity.

The most significant change is an improvement to the show cause and hearings process for Head Start grantees by abolishing the current complex and costly procedures and utilizing instead the Departmental Appeals Board.

DATES: This rule is effective January 13, 1993, with the exception of sections 1303.10 through 1303.23 which will become effective upon assignment of an OMB approval number.

FOR FURTHER INFORMATION CONTACT: Wade F. Horn, Ph.D., Commissioner, Administration on Children, Youth and Families, P.O. Box 1182, Washington, DC 20013, (202) 205-8347.

SUPPLEMENTARY INFORMATION:

I. Program Purpose

Head Start is authorized under the Head Start Act (the Act), section 635 of Public Law 97-35, the Omnibus Budget Reconciliation Act of 1981 (42 U.S.C. 9831 *et seq.*). It is a national program providing comprehensive developmental services primarily to low-income preschool children, age three to the age of compulsory school attendance, and their families. To help enrolled children achieve their full potential, Head Start programs provide comprehensive health, nutritional, educational, social and other services.

In addition, Head Start programs are required to provide for the direct participation of the parents of enrolled children in the development, conduct, and direction of local programs. In FY 1991, Head Start served 583,471 children through a network of 1,346 grantees and 575 delegate agencies which have approved written agreements with grantees to operate Head Start programs.

II. Purpose of the Rule

The Administration for Children and Families (ACF) is amending the current rule governing Head Start grantee and delegate agency appeals at 45 CFR part 1303. The purpose of this revision is to eliminate duplication and increase efficiency in governmental operations by reducing the time expended in preparing and holding an appeal, and conducting a hearing and reaching a final decision. We believe this revision will reduce the cost of an appeal and the total time required for an appeal from the initial request for a review or a hearing on the proposed action to a final decision.

III. Summary of the Major Provisions of the Rule

The new regulations significantly revises, clarifies, and simplifies the appeals process for Head Start grantees and current and prospective delegate agencies. The changes are in response to a review and analysis of data on actual appeals filed by Head Start grantees and delegate agencies.

The following is a summary of the major provisions of the final rule:

(1) Currently, grantees may appeal three types of actions by the Administration for Children and Families (ACF): A termination of financial assistance; a denial of refunding, including certain reductions in funding; and a suspension. This rule requires that all allowable grantee appeals will be heard by the Departmental Appeals Board rather than by ACF staff.

(2) The rule continues to permit current and prospective delegate agencies to appeal to the grantee agency the rejection of an application and the failure of a grantee to act on an application within a timely period. In addition, the rule permits delegate agencies, for the first time, to appeal the termination of a grant or contract.

(3) The rule raises attorney fees from \$100.00 per day to the usual and customary fees for the locality in which the grantee or delegate agency is located, but no higher than \$500.00 per day. This figure will be adjusted to

reflect annual increase in the Consumer Price Index.

(4) If a current or prospective delegate agency is dissatisfied with the grantee's decision, it may appeal that decision to ACF. The rule applies the "arbitrary and capricious" standard of review for appeals to ACF by current or prospective delegate agencies.

(5) Finally, the rule allows the ACF reviewing official to direct a remedy where a specific resolution of the dispute is appropriate.

IV. Rulemaking History

On January 29, 1992, the Department published a Notice of Proposed Rulemaking in the *Federal Register* (57 FR 3394), proposing to amend 45 CFR part 1303. Interested persons were given 60 days in which to comment on the proposed rule. During the 60 day comment period the Department received 11 letters containing 38 comments pertaining to one or more sections of the proposed regulation. There were two general comments, 13 comments on Subpart A, 17 comments on Subpart B, and six comments on Subpart C.

Section-by-Section Discussion of the NPRM

Two of the comments received were general expressions of support for the proposed changes.

Subpart A

Section 1303.1

Purpose and Application. No comments were received on this section.

Section 1303.2

Definitions. No comments were received on this section.

Section 1303.3

Right to an attorney, attorney fees, and travel costs. We received nine comments on paragraph 1303.3(a)(1), which concerns the right to an attorney and attorney fees. Six of these comments were addressed to the NPRM provision which allows attorney fees to be charged to the program grant in an amount equal to the usual and customary fees charged in the locality, up to \$250 per day. Most commenters approved the increase in allowable attorney fees from \$100 per day in the current regulation and the provision for automatic increases for inflation in the maximum allowable fee. Several commenters opposed the maximum as too low, stating that \$250 per day is less than the usual rate for an attorney's services, and that, because of the limitation, it would be difficult for Head Start grantees to find attorneys.

While we appreciate that a maximum allowance of \$250 per day may not meet the prevailing market rate for attorney fees in all places, we have kept this rate in the final rule. We have several reasons for doing so. The increase to \$250 more than doubles the current maximum. The maximum fee will now be indexed for inflation and so will not remain static, as it has in the past. Finally, we have no convincing evidence that a maximum allowance of \$250 per day will seriously disadvantage grantees. The community support that Head Start enjoys should provide any assistance grantees might need to secure effective representation.

In addition, we have clarified this paragraph by changing the reference to "adjusted for inflation" to "adjusted annually to reflect the percentage change in the Consumer Price Index for all Urban Consumers".

We received one comment in support of the provision in the regulation that attorney fees may be charged to the program grant. Two commenters opposed the restriction in paragraph 1303.3(a)(1) that the fees of only one attorney may be charged to the program grant with respect to a particular dispute. We have not changed this provision, which we believe is a legitimate and necessary way to avoid excessive costs being charged to the program. We do not believe that the bringing of appeals by grantees will be unduly hampered as a result of this restriction.

In the NPRM we solicited comments on the advisability of allowing payment of attorney fees (and attorney's travel and per diem costs) only in cases in which the grantee is successful in the final outcome of its appeal. Three comments were received in response to this request, all of them in opposition to the idea. We propose no change to our current policy.

Section 1303.4

Remedies. No comments were received on this section.

Section 1303.5

Service of process. No comments were received on this section.

Section 1303.6

Successor agencies and officials. No comments were received on this section.

Section 1303.7

Effect of failure to file or serve documents in a timely manner. One comment was received on this section, to the effect that the requirements of the NPRM are too restrictive. We have not changed this section, which, while

requiring strict adherence to filing deadlines, is made more flexible by the waiver provisions of section 1303.8.

Section 1303.8

Waiver of requirements. No comments were received on this section. However, we deleted the last sentence of paragraph (b), which states that the requirements of the paragraph may not be waived, and added a new paragraph (g), which prohibits waiver of any of the requirements of section 1303.8. This is more consistent with our intent that waivers be granted only in accordance with the requirements of this section. In addition, we made technical edits to paragraph (e).

Suppart B

Section 1303.10

Purpose. No comments were received on this section.

Section 1303.11

Suspension on notice and opportunity to show cause. We received four comments on this section. One commenter opposed the provision in section 1303.11(f) which states that any delegate agency that wishes to participate in an informal meeting regarding an intended suspension of the grantee may request permission to do so from the responsible Department of Health and Human Services' (HHS) official. We have not changed this provision, which states that the HHS official, in acting on any such request from a delegate agency, must take into account the effect of the proposed suspension on the particular delegate agency, the extent to which the meeting would become unduly complicated as a result of granting such permission, and the extent to which the interests of the delegate agency appear to be adequately represented by other participants. Two commenters objected to section 1303.11(j), which states that an interim grantee may be named during a non-summary suspension. (One of these commenters objected to the interim grantee provisions of sections 1303.13 and 1303.14 as well.) We have not changed the interim grantee provision of this section, which is necessary to insure that services to children and families continue during the suspension of the grant. Another commenter noted that section 1303.11(g) does not make clear when the responsible official has to make a decision if no informal meeting is held. We have corrected this omission by adding, at the end of the second sentence, the words "or, if no informal meeting is held, within five days of receipt by the responsible HHS

official of written material from all concerned parties."

Section 1303.12

Summary suspension and opportunity to show cause. One commenter objected to section 1303.12(1), which states that the responsible HHS official may appoint an agency to serve as interim grantee for a grantee which has been summarily suspended. This same commenter, and a different commenter, objected to the interim grantee provision of section 1303.13(e). We have not changed the interim grantee provisions of these sections, which, like that in section 1303, is necessary to insure that services to children and families continue during the suspension of the grant.

Section 1303.13

Appeal by a grantee of a suspension continuing for more than 30 days. Two comments were received opposing the interim grantee provision of section 1303.13(e). As noted above in the discussion of section 1303.12, we have not changed this provision. One commenter to sections 1303.13(f), 1303.14(c)(2), and 1303.15(d)(3) stated that, in order to speed up the appeals process, the notice of adverse action should specify that any appeal should be sent directly to the Departmental Appeals Board (DAB) and that the appellant must send a copy of the appeal to the responsible HHS official and the Commissioner, ACYF. We concur with this suggestion and have changed the final rule accordingly. A comment was received which noted that, unlike section 1303.21(a), neither section 1303.13, 1303.14 nor section 1303.15 contains any instructions about the contents of an appeal. We agree that sections 1303.13, 1303.14 and 1303.15 would be more clear and complete with instructions on the contents of an appeal. Instructions have been added to paragraphs 1303.13(f), 1303.14(c)(2) and 1303.15(d)(3).

Section 1303.14

Appeal by a grantee from a Termination of Financial Assistance. One commenter found section 1303.14 confusing in that it refers both to a right to an appeal and a right to a hearing, but only specifies that requests for hearings be transmitted to the DAB. This commenter suggests that, as in section 1303.15, this section use the word "appeal" throughout. We have changed this section by replacing the words "responsible HHS official" in paragraph 1303.14(c)(2) with the words "Departmental Appeals Board," and by deleting paragraph 1303.14(d).

(Paragraphs (e) through (k) of the NPRM have been redesignated accordingly.) This change both addresses the commenter's concern and eliminates the need for the transmission of the grantee's appeal request from the responsible HHS official to the Commissioner, ACYF, and from the Commissioner, ACYF, to the Departmental Appeals Board. In paragraph 1303.14(c)(5), we deleted the phrase " * * * the matter has been set down for hearing at a stated time and place or that * * * ", which was inadvertently included in the NPRM. Only the Departmental Appeals Board should set the date and time for any hearing. This change is in accord with 45 CFR 1303.16(g).

We received one comment on this section objecting to the absence of a statement in the NPRM as to which party in an appeal under this section and section 1303.15 (dealing with appeals from denials of refunding) has the burden of proof. The current regulation provides that "ACYF will have the burden of justifying the proposed termination action." We have removed this sentence from the final rule because appeals will be heard by the Departmental Appeals Board. A comment was received on paragraph 1303.14(j) stating that it is highly undesirable to allow the responsible HHS official to set the deadline for the filing of a brief by an appellant who has waived its right to a hearing, since the official is a party in interest. It was suggested that the DAB set the deadline. We agree with this comment and have changed the final rule accordingly.

Finally, one commenter opposed the interim grantee provision of paragraph 1303.14(e)(1), stating that the naming of an interim grantee, except in cases of alleged criminal activity or apparent danger to children or staff, constitutes an assumption that the appeal will not be decided in the grantee's favor. In response to this comment, we have modified the interim grantee provision of this section to make clear what happens when a grantee appeals an administrative decision to court. We have added paragraph 1303.14(d)(3), which provides that if a grantee does not appeal the administrative decision to court within 30 days of its receipt of it, a replacement grantee will be immediately sought, and an interim grantee named, if needed, pending that selection. This modification reflects the fact that a replacement grantee may not be sought when a grantee appeals an administrative decision to court. However, we have specified at paragraph (d)(4) that an interim grantee may be sought even though the grantee

has appealed within 30 days, if the responsible HHS official determines it necessary to do so. Examples of circumstances that warrant an interim grantee are to protect children and families from harm, and Federal funds from misuse or dissipation, or both. An interim grantee might be needed to keep the program viable in the community until the permanent successor is selected. We believe that 30 days is adequate for a grantee to decide to appeal since the matter would already have been considered in administrative proceedings and a record developed. Further, we do not believe that the process of selecting a permanent grantee should be delayed unreasonably. ACYF believes that it is important for the program's children and their families that stability be provided to the program as soon as possible, consistent with fairness to grantees. We believe the new regulation accomplishes that goal. Paragraph (d)(2) with regard to suspension of funding has been modified to clarify that an interim grantee will be appointed during the appeal period.

We have made some changes to paragraph 1303.14(i) to clarify the regulation. Grantee appeals of termination actions are to the Department Appeals Board. Therefore, all of their submissions must be to the Board, with copies as required by Board procedures. The Board, consistent with its current practices, will decide the appeal based on the written information and argument submitted to it. What is properly submitted will be determined by the Board, except as may otherwise be required by these regulations.

Section 1303.15

Appeal by a grantee from a denial of refunding. We received one comment in opposition to the last sentence of paragraph 1303.15(c), which permits refunding to be denied if it is concluded that continuing a particular program is no longer in the public interest. We have deleted this provision, since the grounds upon which the Department may seek to deny refunding are sufficiently broad to meet the Department's concerns.

Section 1303.16

Conduct of hearing. One commenter stated that paragraph 1303.16(b) should be deleted because DAB regulations already have a rule against communications outside the record. Since the DAB's usual procedure is for the presiding officer to set up the hearing, it was suggested that paragraph 1303.16(b) be changed to provide that the notice of hearing and issues be filed

by (instead of with) the presiding officer. The same commenter stated that it is inappropriate to provide for the assistance of an attorney from the Department's General Counsel's office since the Board has its own staff attorneys. We concur with these comments and have made the following changes to paragraph 1303.16(b). The first sentence has been changed and now refers only to the prohibition on communications outside the record as provided by 45 CFR 16.17. The second sentence of paragraph 1303.16(b) has been deleted. One comment was received on paragraph 1303.16(e), which allows any person or organization that wishes to participate in a proceeding to apply for permission to do so from the presiding officer. The commenter stated that the provision is too broadly worded. We do not agree, and, therefore, have not changed this paragraph, which requires the person or organization which wishes to participate to state their interest in the proceeding, the evidence or arguments they intend to contribute, and the necessity for the introduction of such evidence or arguments.

Subpart C

Section 1303.20

Appeals to grantees by current or prospective delegate agencies on rejection of an application, failure to act on an application, or termination of a grant or contract. We received three comments on this section. One of the comments was on the right of a delegate agency to appeal a grantee's decision to terminate an agreement with it. This commenter strongly opposed this new right, saying that when relations between a grantee and delegate have worsened to the point where the grantee is moving to terminate the agreement between the parties, the only possible solution is intervention by the appropriate HHS official. While we are cognizant of the fact that grantee-delegate agency relations in cases in which the grantee is moving to terminate the contract which binds them may be quite strained, we think this step is very important for two reasons. First, the delegate's appeal to the grantee will create a record which the HHS official will have to review if that official is called upon to make a decision in the matter. Second, a thorough review of the situation by the parties will result in the resolution of more grantee-delegate agency disputes before they reach the HHS official. Two comments were received on the provision of this section which allows a delegate agency to have a responsible

HHS official review a grantee's rejection or failure to act on an application, or termination of a grant or contract. One commenter supported this provision, while the second opposed it, apparently on the ground that "review" by the official is not the same as an appeal. We have not changed the provision, and note that the "review" by an HHS official referred to in the NPRM's discussion of this section is in fact an appeal to the official (see paragraphs 1303.20(d) and 1303.21).

Section 1303.21

Procedures for appeal by current or prospective delegate agencies to the responsible HHS official from denials by grantees of an application or failure to act on an application. Two comments were received in opposition to the right of prospective delegate agencies, under paragraph 1303.21(a), to appeal from a grantee's denial of, or failure to act on, an application. The right of prospective delegate agencies to bring such appeals is found in section 646 of the Head Start Act (42 U.S.C. 9841). We have not made any changes to this section, which we believe simplifies and makes consistent the current regulatory provisions. One comment was received on paragraph 1303.21(e)(1), which states that a responsible HHS official may meet informally with a current or prospective delegate agency if the official determines that such a meeting would be beneficial to the resolution of the appeal. The commenter believes that no meeting should be held with the delegate agency without the grantee present, and that the provision that the meetings can be conducted by conference call should be deleted. Paragraph 1303.21(e)(2) states that "Both the grantee and the current or prospective delegate agency may attend any informal meeting concerning the appeal." We do not believe the comment is well founded and have therefore left this paragraph as it was in the NPRM.

Section 1303.22

Decision on appeal in favor of grantee. No comments were received on this section.

Section 1303.23

Decision on appeal in favor of current or prospective delegate agency. No comments were received on this section.

Redesignation and Consolidation Table

Current section	New section
1303.1	No redesignation.
1303.2	No redesignation.
1303.3	No redesignation.

Current section	New section
1303.4	No redesignation.
None	1303.5
None	1303.6
None	1303.7
None	1303.8
1303.10	1303.20
1303.11 and 1303.14	1303.21
1303.12	1303.22
1303.13 and 1303.15-19	1303.23
1303.20	1303.15
1303.21	1303.15
1303.22	1303.15
1303.23	1303.15
1303.24	1303.15
1303.25	1303.15
1303.26	None.
1303.30	1303.10
1303.31	1303.11
1303.32	1303.12
None	1303.13
1303.33	1303.14
1303.34	None.
1303.35	1303.16
1303.36	None.
1303.37	None.

V. Impact Analysis

Executive Order 12291

Executive Order 12291 requires that a regulatory impact analysis be prepared for major rules, which are defined in the Order as any rule that has an annual effect on the national economy of \$100 million or more, or certain other specified effects. The Department has determined that this rule is not a major rule within the Executive Order because it will not have an annual effect on the economy of \$100 million or more; nor result in a major increase in costs or prices for consumers, any industries, any governmental agencies, or any geographic region; and, it will not have an adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or import markets.

This rule revises and clarifies the existing regulatory provisions regarding Head Start grantee and delegate agency appeals. It eliminates duplication and increases efficiency in governmental operations by reducing the time necessary to prepare an appeal, conduct a hearing, and reach a final decision. The final rule also revises, clarifies and simplifies the appeals process for Head Start grantees and current and prospective delegate agencies. The final rule requires that all allowable grantee appeals will be heard by the Departmental Appeals Board; permits a delegate agency to appeal the termination of a grant or contract; and allows the ACF reviewing official to direct a remedy where a specific resolution of the dispute is appropriate.

Our estimate of resource needs indicates that, while this final rule

would affect some grantees and delegates who exercise their right to an appeal, it will not have a significant impact on the economy or result in a major increase in costs or prices for a substantial number of entities. We based this estimate on previous Head Start grantee and delegate agency appeals and the additional resources in some instances needed to implement the requirements. However, we estimate that this revision of the appeals process will be a direct benefit to the Government, grantees and the public since appeals procedures are simplified and one level of review is eliminated, thereby reducing some costs and speeding up the entire process. Thus, the Department concluded that this rule is not a major rule within the meaning of the Executive Order because it does not meet the threshold criteria.

Regulatory Flexibility Act of 1980

Consistent with the Regulatory Flexibility Act of 1980 (5 U.S.C. chapter 6) we have tried to anticipate and reduce the impact of rules and paperwork requirements on small businesses. The public burden is estimated to be 45 hours of work load per response. This is a reduction in the paperwork burden placed on grantees because there will be less duplication of documents given the reduction in appeal levels. For each rule with a "significant economic impact on a substantial number of small entities" we must analyze the rule's impact on small entities. Small entities are defined by the Act to include small businesses, small non-profit organizations, and small governmental entities. While this final rule would affect small entities, it will not have a significant economic impact on a substantial number of small entities. For these reasons, the Secretary certifies that this rule will not have a significant impact on a substantial number of small entities.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1980, Public Law 96-511, all Departments are required to submit to the Office of Management and Budget (OMB) for review and approval any reporting or record keeping requirement in a proposed and final rule. This final rule contains information collection requirements in § 1303.10 through § 1303.23 which will be submitted to OMB for review and approval in accordance with § 3504(h). Organizations and individuals desiring to submit comments on the information collection requirements should direct them to the agency official designated for this purpose, whose name appears in

this preamble, and to the Office of Information and Regulatory Affairs, OMB, New Executive Office Building (room 3002), Washington, DC 20503, Attention: Desk Officer for HHS/ACF.

List of Subjects in 45 CFR Part 1303

Administrative practice and procedures, Appeal procedures for Head Start grantees and current or prospective delegate agencies, Education of disadvantaged, Grant programs-social programs.

(Catalog of Federal Domestic Assistance Program Number 93.600, Project Head Start)

Dated: July 1, 1992.

Jo Anne B. Barnhart,

Assistant Secretary for Children and Families.

Approved: August 18, 1992.

Louis W. Sullivan,

Secretary.

For the reasons set forth in the Preamble, chapter XIII, subchapter B, part 1303, of title 45 of the Code of Federal Regulations is revised to read as follows:

PART 1303—APPEAL PROCEDURES FOR HEAD START GRANTEES AND CURRENT OR PROSPECTIVE DELEGATE AGENCIES

Subpart A—General

Sec.

- 1303.1 Purpose and application.
- 1303.2 Definitions.
- 1303.3 Right to attorney, attorney fees, and travel costs.
- 1303.4 Remedies.
- 1303.5 Service of process.
- 1303.6 Successor agencies and officials.
- 1303.7 Effect of failure to file or serve documents in a timely manner.
- 1303.8 Waiver of requirements.

Subpart B—Appeals by Grantees

- 1303.10 Purpose.
- 1303.11 Suspension on notice and opportunity to show cause.
- 1303.12 Summary suspension and opportunity to show cause.
- 1303.13 Appeal by a grantee of a suspension continuing for more than 30 days.
- 1303.14 Appeal by a grantee from a termination of financial assistance.
- 1303.15 Appeal by a grantee from a denial of refunding.
- 1303.16 Conduct of hearing.

Subpart C—Appeals by Current or Prospective Delegate Agencies

- 1303.20 Appeals to grantees by current or prospective delegate agencies of rejection of an application, failure to act on an application, or termination of a grant or contract.
- 1303.21 Procedures for appeal by current or prospective delegate agencies to the responsible HHS official from denials by grantees of an application or failure to act on an application.

1303.22 Decision on appeal in favor of grantee.

1303.23 Decision on appeal in favor of the current or prospective delegate agency.

Authority: 42 U.S.C. 9801 *et seq.*

Subpart A—General

§ 1303.1 Purpose and application.

This part prescribes regulations based on section 646 of the Head Start Act, 42 U.S.C. 9841, as it applies to grantees and current or prospective delegate agencies engaged in or wanting to engage in the operation of Head Start programs under the Act. It prescribes the procedures for appeals by current and prospective delegate agencies from specified actions or inaction by grantees. It also provides procedures for reasonable notice and opportunity to show cause in cases of suspension of financial assistance by the responsible HHS official and for an appeal to the Departmental Appeals Board by grantees in cases of denial of refunding, termination of financial assistance, and suspension of financial assistance.

§ 1303.2 Definitions.

As used in this part:

Act means the Head Start Act, 42 U.S.C. section 9831, *et seq.*

ACYF means the Administration on Children, Youth and Families in the Department of Health and Human Services, and includes Regional staff.

Agreement means either a grant or a contract between a grantee and a delegate agency for the conduct of all or part of the grantee's Head Start program.

Day means the 24 hour period beginning at 12 a.m. local time and continuing for the next 24 hour period. It includes all calendar days unless otherwise expressly noted.

Delegate Agency means a public or private non-profit organization or agency to which a grantee has delegated by written agreement the carrying out of all or part of its Head Start program.

Denial of Refunding means the refusal of a funding agency to fund an application for a continuation of a Head Start program for a subsequent program year when the decision is based on a determination that the grantee has improperly conducted its program, or is incapable of doing so properly in the future, or otherwise is in violation of applicable law, regulations, or other policies.

Funding Agency means the agency that provides funds directly to either a grantee or a delegate agency. ACYF is the funding agency for a grantee, and a grantee is the funding agency for a delegate agency.

Grantee means the local public or private non-profit agency which has

been designated as a Head Start agency under 42 U.S.C. 9836 and which has been granted financial assistance by the responsible HHS official to operate a Head Start program.

Interim Grantee means an agency which has been appointed to operate a Head Start program for a period of time not to exceed one year while an appeal of a denial of refunding, termination or suspension action is pending.

Prospective Delegate Agency means a public or private non-profit agency or organization which has applied to a grantee to serve as a delegate agency.

Responsible HHS Official means the official who is authorized to make the grant of financial assistance to operate a Head Start program or his or her designee.

Submittal means the date of actual receipt or the date the material was served in accordance with § 1303.5 of this part for providing documents or notices of appeals, and similar matters, to either grantees, delegate agencies, prospective delegate agencies, or ACYF.

Substantial Rejection means that a funding agency requires that the funding of a current delegate agency be reduced to 80 percent or less of the current level of operations for any reason other than a determination that the delegate agency does not need the funds to serve all the eligible persons it proposes to serve.

Suspension of a grant means temporary withdrawal of the grantee's authority to obligate grant funds pending corrective action by the grantee.

Termination of a grant or delegate agency agreement means permanent withdrawal of the grantee's or delegate agency's authority to obligate previously awarded grant funds before that authority would otherwise expire. It also means the voluntary relinquishment of that authority by the grantee or delegate agency. Termination does not include:

(1) Withdrawal of funds awarded on the basis of the grantee's or delegate agency's underestimate of the unobligated balance in a prior period;

(2) Refusal by the funding agency to extend a grant or award additional funds (such as refusal to make a competing or noncompeting continuation renewal, extension or supplemental award);

(3) Withdrawal of the unobligated balance as of the expiration of a grant;

(4) Annulment, i.e., voiding of a grant upon determination that the award was obtained fraudulently or was otherwise illegal or invalid from its inception.

Work day means any 24 hour period beginning at 12 a.m. local time and

continuing for 24 hours. It excludes Saturdays, Sundays, and legal holidays. Any time ending on one of the excluded days shall extend to 5 p.m. of the next full work day.

§ 1303.3 Right to attorney, attorney fees, and travel costs.

(a) All parties to proceedings under this part, including informal proceedings, have the right to be represented by an attorney.

(1) Attorney fees may be charged to the program grant in an amount equal to the usual and customary fees charged in the locality. However, such fees may not exceed \$250.00 per day, adjusted annually to reflect the percentage change in the Consumer Price Index for All Urban Consumers (issued by the Bureau of Labor Statistics) beginning one year after the effective date of these regulations. The grantee or delegate agency may use current operating funds to pay these costs. The fees of only one attorney may be charged to the program grant with respect to a particular dispute. Such fees may not be charged if the grantee or delegate agency has an attorney on its staff, or if it has a retainer agreement with an attorney which fully covers fees connected with litigation. The grantee or delegate agency shall have the burden of establishing the usual and customary fees and shall furnish documentation to support that determination that is satisfactory to the responsible HHS official.

(2) A grantee or delegate agency may designate up to two persons to attend and participate in proceedings held under this Part. Travel and per diem costs of such persons, and of an attorney representing the grantee or delegate agency, shall not exceed those allowable under Standard Governmental Travel Regulations in effect at the time of the travel.

(b) In the event that use of program funds under this section would result in curtailment of program operations or inability to liquidate prior obligations, the party so affected may apply to the responsible HHS official for payment of these expenses.

(c) The responsible HHS official, upon being satisfied that these expenditures would result in curtailment of program operations or inability to liquidate prior obligations, must make payment therefor to the affected party by way of reimbursement from currently available funds.

§ 1303.4 Remedies.

The procedures established by subparts B and C of this Part shall not be construed as precluding ACYF from

pursuing any other remedies authorized by law.

§ 1303.5 Service of process.

Whenever documents are required to be filed or served under this part, or notice provided under this part, certified mail shall be used with a return receipt requested. Alternatively, any other system may be used that provides proof of the date of receipt of the documents by the addressee. If this regulation is not complied with, and if a party alleges that it failed to receive documents allegedly sent to it, there will be a rebuttable presumption that the documents or notices were not sent as required by this part, or as alleged by the party that failed to use the required mode of service. The presumption may be rebutted only by a showing supported by a preponderance of evidence that the material was in fact submitted in a timely manner.

§ 1303.6 Successor agencies and officials.

Wherever reference is made to a particular Federal agency, office, or official it shall be deemed to apply to any other agency, office, or official which subsequently becomes responsible for administration of the program or any portion of it.

§ 1303.7 Effect of failure to file or serve documents in a timely manner.

(a) Whenever an appeal is not filed within the time specified in these or related regulations, the potential appellant shall be deemed to have consented to the proposed action and to have waived all rights of appeal.

(b) Whenever a party has failed to file a response or other submission within the time required in these regulations, or by order of an appropriate HHS responsible official, the party shall be deemed to have waived the right to file such response or submission.

(c) A party fails to comply with the requisite deadlines or time frames if it exceeds them by any amount.

(d) The time to file an appeal, response, or other submission may be waived in accordance with § 1303.8 of this part.

§ 1303.8 Waiver of requirements.

(a) Any procedural requirements required by these regulations may be waived by the responsible HHS official or such waiver requests may be granted by the Departmental Appeals Board in those cases where the Board has jurisdiction. Requests for waivers must be in writing and based on good cause.

(b) Approvals of waivers must be in writing and signed by the responsible HHS official or by the Departmental Appeals Board when it has jurisdiction.

(c) "Good cause" consists of the following:

(1) Litigation dates cannot be changed;

(2) Personal emergencies pertaining to the health of a person involved in and essential to the proceeding or to a member of that person's immediate family, spouse, parents, or siblings;

(3) The complexity of the case is such that preparation of the necessary documents cannot reasonably be expected to be completed within the standard time frames;

(4) Other matters beyond the control of the party requesting the waiver, such as strikes and natural disasters.

(d) Under no circumstances may "good cause" consist of a failure to meet a deadline due to the oversight of either a party or its representative.

(e) Waivers of timely filing or service shall be granted only when necessary in the interest of fairness to all parties, including the Federal agency. They will be granted sparingly as prompt resolution of disputes is a major goal of these regulations. The responsible HHS official or the Departmental Appeals Board shall have the right, on own motion or on motion of a party, to require such documentation as deemed necessary in support of a request for a waiver.

(f) A request for an informal meeting by a delegate agency, including a prospective delegate agency, may be denied by the responsible HHS official, on motion of the grantee or on his or her own motion, if the official concludes that the written appeal fails to state plausible grounds for reversing the grantee's decision or the grantee's failure to act on an application.

(g) The requirements of this section may not be waived.

Subpart B—Appeals by Grantees

§ 1303.10 Purpose.

(a) This subpart establishes rules and procedures for the suspension of a grantee, denial of a grantee's application for refunding, or termination of assistance under the Act for circumstances related to the particular grant, such as ineffective or improper use of Federal funds or for failure to comply with applicable laws, regulations, policies, instructions, assurances, terms and conditions or, in accordance with part 1302 of this chapter, upon loss by the grantee of legal status or financial viability.

(b) This subpart does not apply to any administrative action based upon any violation, or alleged violation, of title VI of the Civil Rights Act of 1964.

§ 1303.11 Suspension on notice and opportunity to show cause.

(a) After receiving concurrence from the Commissioner, ACYF, the responsible HHS official may suspend financial assistance to a grantee in whole or in part for breach or threatened breach of any requirement stated in § 1303.10 pursuant to notice and opportunity to show cause why assistance should not be suspended.

(b) The responsible HHS official will notify the grantee as required by § 1303.5 or by telegram that ACYF intends to suspend financial assistance, in whole or in part, unless good cause is shown why such action should not be taken. The notice will include:

(1) The grounds for the proposed suspension;

(2) The effective date of the proposed suspension;

(3) Information that the grantee has the opportunity to submit written material in opposition to the intended suspension and to meet informally with the responsible HHS official regarding the intended suspension;

(4) Information that the written material must be submitted to the responsible HHS official at least seven days prior to the effective date of the proposed suspension and that a request for an informal meeting must be made in writing to the responsible HHS official no later than seven days after the day the notice of intention to suspend was mailed to the grantee;

(5) Invitation to correct the deficiency by voluntary action; and

(6) A copy of this subpart.

(c) If the grantee requests an informal meeting, the responsible HHS official will fix a time and place for the meeting. In no event will such meeting be scheduled less than seven days after the notice of intention to suspend was sent to the grantee.

(d) The responsible HHS official may at his or her discretion extend the period of time or date for making requests or submitting material by the grantee and will notify the grantee of any such extension.

(e) At the time the responsible HHS official sends the notice of intention to suspend financial assistance to the grantee, the official will send a copy of it to any delegate agency whose activities or failures to act are a substantial cause of the proposed suspension, and will inform such delegate agency that it is entitled to submit written material in opposition and to participate in the informal meeting with the responsible HHS official if one is held. In addition, the responsible HHS official may give such

notice to any other Head Start delegate agency of the grantee.

(f) Within three days of receipt of the notice of intention to suspend financial assistance, the grantee shall send a copy of such notice and a copy of this subpart to all delegate agencies which would be financially affected by the proposed suspension action. Any delegate agency that wishes to submit written material may do so within the time stated in the notice. Any delegate agency that wishes to participate in the informal meeting regarding the intended suspension, if not otherwise afforded a right to participate, may request permission to do so from the responsible HHS official, who may grant or deny such permission. In acting upon any such request from a delegate agency, the responsible HHS official will take into account the effect of the proposed suspension on the particular delegate agency, the extent to which the meeting would become unduly complicated as a result of granting such permission, and the extent to which the interests of the delegate agency requesting such permission appear to be adequately represented by other participants.

(g) The responsible HHS official will consider any timely material presented in writing, any material presented during the course of the informal meeting as well as any showing that the grantee has adequately corrected the deficiency which led to the suspension proceedings. The decision of the responsible HHS official will be made within five days after the conclusion of the informal meeting, or, if no informal meeting is held, within five days of receipt by the responsible HHS official of written material from all concerned parties. If the responsible HHS official concludes that the grantee has failed to show cause why financial assistance should not be suspended, the official may suspend financial assistance in whole or in part and under such terms and conditions as he or she specifies.

(h) Notice of such suspension will be promptly transmitted to the grantee as required in § 1303.5 of this part or by some other means showing the date of receipt, and shall become effective upon delivery or on the date delivery is refused or the material is returned. Suspension shall not exceed 30 days unless the responsible HHS official and the grantee agree to a continuation of the suspension for an additional period of time. If termination proceedings are initiated in accordance with § 1303.14, the suspension of financial assistance will be rescinded.

(i) New obligations incurred by the grantee during the suspension period will not be allowed unless the

granting agency expressly authorizes them in the notice of suspension or an amendment to it. Necessary and otherwise allowable costs which the grantee could not reasonably avoid during the suspension period will be allowed if they result from obligations properly incurred by the grantee before the effective date of the suspension and not in anticipation of suspension or termination. At the discretion of the granting agency, third-party in-kind contributions applicable to the suspension period may be allowed in satisfaction of cost sharing or matching requirements.

(j) The responsible HHS official may appoint an agency to serve as an interim grantee to operate the program until the grantee's suspension is lifted.

(k) The responsible HHS official may modify the terms, conditions and nature of the suspension or rescind the suspension action at any time on his or her own initiative or upon a satisfactory showing that the grantee has adequately corrected the deficiency which led to the suspension and that repetition is not threatened. Suspension partly or fully rescinded may, at the discretion of the responsible HHS official, be reimposed with or without further proceedings, except that the total time of suspension may not exceed 30 days unless termination proceedings are initiated in accordance with § 1303.14 or unless the responsible HHS official and the grantee agree to continuation of the suspension for an additional period of time. If termination proceedings are initiated, the suspension of financial assistance will be rescinded.

§ 1303.12 Summary suspension and opportunity to show cause.

(a) After receiving concurrence from the Commissioner, ACYF, the responsible HHS official may suspend financial assistance in whole or in part without prior notice and an opportunity to show cause if it is determined that immediate suspension is necessary because of a serious risk of:

(1) Substantial injury to property or loss of project funds; or

(2) Violation of a Federal, State, or local criminal statute; or

(3) If staff or participants' health and safety are at risk.

(b) The notice of summary suspension will be given to the grantee as required by § 1303.5 of this part, or by some other means showing the date of receipt, and shall become effective on delivery or on the date delivery is refused or the material is returned unclaimed.

(c) The notice must include the following items:

- (1) The effective date of the suspension;
- (2) The grounds for the suspension;
- (3) The extent of the terms and conditions of any full or partial suspension;
- (4) A statement prohibiting the grantee from making any new expenditures or incurring any new obligations in connection with the suspended portion of the program; and
- (5) A statement advising the grantee that it has an opportunity to show cause at an informal meeting why the suspension should be rescinded. The request for an informal meeting must be made by the grantee in writing to the responsible HHS official no later than five workdays after the effective date of the notice of summary suspension as described in paragraph (b) of this section.
- (d) If the grantee requests in writing the opportunity to show cause why the suspension should be rescinded, the responsible HHS official will fix a time and place for an informal meeting for this purpose. This meeting will be held within five workdays after the grantee's request is received by the responsible HHS official. Notwithstanding the provisions of this paragraph, the responsible HHS official may proceed to deny refunding or initiate termination proceedings at any time even though financial assistance of the grantee has been suspended in whole or in part.
- (e) Notice of summary suspension must also be furnished by the grantee to its delegate agencies within two workdays of its receipt of the notice from ACYF by certified mail, return receipt requested, or by any other means showing dates of transmittal and receipt or return as undeliverable or unclaimed. Delegate agencies affected by the summary suspension have the right to participate in the informal meeting as set forth in paragraph (d) of this section.
- (f) The effective period of a summary suspension of financial assistance may not exceed 30 days unless:
 - (1) The conditions creating the summary suspension have not been corrected; or
 - (2) The parties agree to a continuation of the summary suspension for an additional period of time; or
 - (3) The grantee, in accordance with paragraph (d) of this section, requests an opportunity to show cause why the summary suspension should be rescinded, in which case it may remain in effect in accordance with paragraph (h) of this section; or
 - (4) Termination or denial of refunding proceedings are initiated in accordance with § 1303.14 or § 1303.15.

(g) Any summary suspension that remains in effect for more than 30 days is subject to the requirements of § 1303.13 of this part. The only exceptions are where there is an agreement under paragraph (f)(2) of this section, or the circumstances described in paragraph (f)(4) or (h)(1) of this section exist.

(h)(1) If the grantee requests an opportunity to show cause why a summary suspension should be rescinded, the suspension of financial assistance will continue in effect until the grantee has been afforded such opportunity and a decision has been made by the responsible HHS official.

(2) If the suspension continues for more than 30 days, the suspension remains in effect even if it is appealed to the Departmental Appeals Board.

(3) Notwithstanding any other provisions of these or other regulations, if a denial of refunding occurs or a termination action is instituted while the summary suspension is in effect, the suspension shall merge into the later action and funding shall not be available until the action is rescinded or a decision favorable to the grantee is rendered.

(i) The responsible HHS official must consider any timely material presented in writing, any material presented during the course of the informal meeting, as well as any other evidence that the grantee has adequately corrected the deficiency which led to the summary suspension.

(j) A decision must be made within five work days after the conclusion of the informal meeting with the responsible HHS official. If the responsible HHS official concludes, after considering the information provided at the informal meeting, that the grantee has failed to show cause why the suspension should be rescinded, the responsible HHS official may continue the suspension, in whole or in part and under the terms and conditions specified in the notice of suspension.

(k) New obligations incurred by the grantee during the suspension period will not be allowed unless the granting agency expressly authorizes them in the notice of suspension or by an amendment to the notice. Necessary and otherwise allowable costs which the grantee could not reasonably avoid during the suspension period will be allowed if they result from obligations properly incurred by the grantee before the effective date of the suspension and not in anticipation of suspension, denial of refunding or termination.

(1) The responsible HHS official may appoint an agency to serve as an interim

grantee to operate the program until either the grantee's summary suspension is lifted or a new grantee is selected in accordance with subpart B of this part.

(m) At the discretion of the funding agency, third-party in-kind contributions applicable to the suspension period may be allowed in satisfaction of cost sharing or matching requirements.

(n) The responsible HHS official may modify the terms, conditions and nature of the summary suspension or rescind the suspension action at any time upon receiving satisfactory evidence that the grantee has adequately corrected the deficiency which led to the suspension and that the deficiency will not occur again. Suspension partly or fully rescinded may, at the discretion of the responsible HHS official, be reimposed with or without further proceedings.

§ 1303.13 Appeal by a grantee of a suspension continuing for more than 30 days.

(a) This section applies to summary suspensions that are initially issued for more than 30 days and summary suspensions continued for more than 30 days except those identified in paragraph § 1303.12(g) of this part.

(b) After receiving concurrence from the Commissioner, ACYF, the responsible HHS official may suspend a grant for more than 30 days. A suspension may, among other bases, be imposed for the same reasons that justify termination of financial assistance or which justify a denial of refunding of a grant.

(c) A notice of a suspension under this section shall set forth:

- (1) The reasons for the action;
- (2) The duration of the suspension, which may be indefinite;
- (3) The fact that the action may be appealed to the Departmental Appeals Board and the time within which it must be appealed.

(d) During the period of suspension a grantee may not incur any valid obligations against Federal Head Start grant funds, nor may any grantee expenditure or provision of in-kind services or items of value made during the period be counted as applying toward any required matching contribution required of a grantee, except as otherwise provided in this part.

(e) The responsible HHS official may appoint an agency to serve as an interim grantee to operate the program until either the grantee's suspension is lifted or a new grantee is selected in accordance with subparts B and C of 45 CFR part 1302.

(f) Any appeal to the Departmental Appeals Board must be made within five days of the grantee's receipt of notice of suspension or return of the notice as undeliverable, refused, or unclaimed. Such an appeal must be in writing and it must fully set forth the grounds for the appeal and be accompanied by all documentation that the grantee believes is relevant and supportive of its position.

All such appeals shall be addressed to the Departmental Appeals Board, and the appellant will send a copy of the appeal to the Commissioner, ACYF, and the responsible HHS official. Appeals will be governed by the Departmental Appeals Board's regulations at 45 CFR part 16, except as otherwise provided in the Head Start appeals regulations. Any grantee requesting a hearing as part of its appeal shall be afforded one by the Departmental Appeals Board.

(g) If a grantee is successful on its appeal any costs incurred during the period of suspension that are otherwise allowable may be paid with Federal grant funds. Moreover, any cash or in-kind contributions of the grantee during the suspension period that are otherwise allowable may be counted toward meeting the grantee's non-Federal share requirement.

(h) If a grantee's appeal is denied by the Departmental Appeals Board, but the grantee is subsequently restored to the program because it has corrected those conditions which warranted the suspension, its activities during the period of the suspension remain outside the scope of the program.

Federal funds may not be used to offset any costs during the period, nor may any cash or in-kind contributions received during the period be used to meet non-Federal share requirements.

(i) If the Federal agency institutes termination proceedings during a suspension, or denies refunding, the two actions shall merge and the grantee need not file a new appeal. Rather, the Departmental Appeals Board will be notified by the Federal agency and will automatically be vested with jurisdiction over the termination action or the denial of refunding and will, pursuant to its rules and procedures, permit the grantee to respond to the notice of termination. In a situation where a suspension action is merged into a termination action in accordance with this section, the suspension continues until there is an administrative decision by the Departmental Appeals Board on the grantee's appeal.

§ 1303.14 Appeal by a grantee from a termination of financial assistance.

(a) After receiving concurrence from the Commissioner, ACYF, the responsible HHS official may terminate financial assistance to a grantee. Financial assistance may be terminated in whole or in part.

(b) Financial assistance may be terminated for any or all of the following reasons:

(1) The grantee is no longer financially viable;

(2) The grantee has lost the requisite legal status or permits;

(3) The grantee has failed to comply with the required fiscal or program reporting requirements applicable to grantees in the Head Start program;

(4) The grantee has failed to meet the performance standards for operation of Head Start programs that are applicable to grantees;

(5) The grantee has failed to comply with the eligibility requirements and limitations on enrollment in the Head Start program, or both;

(6) The grantee has failed to comply with the Head Start grants administration requirements set forth in 45 CFR part 1301;

(7) The grantee has failed to comply with the requirements of the Head Start Act;

(8) The grantee is debarred from receiving Federal grants or contracts;

(9) The grantee fails to abide by any other terms and conditions of its award of financial assistance, or any other applicable laws, regulations, or other applicable Federal or State requirements or policies.

(c) A notice of termination shall set forth:

(1) The violations or actions justifying the termination.

(2) The fact that the termination may be appealed within 10 days to the Departmental Appeals Board (with a copy of the appeal sent to the responsible HHS official and the Commissioner, ACYF) and that such appeals shall be governed by 45 CFR part 16, except as otherwise provided in the Head Start appeals regulations, and that any grantee which requests a hearing shall be afforded one, as mandated by 42 U.S.C. 9841. Such an appeal must be in writing and must fully set forth the grounds for the appeal and be accompanied by all of the documentation that the grantee believes is relevant and supportive of its position.

(3) That the appeal may be made only by the Board of Directors of the grantee or an official acting on behalf of such Board.

(4) That, if the activities of a delegate agency are the basis, in whole or in part,

for the proposed termination, the identity of the delegate agency.

(5) Information that the grantee has a right to request a hearing in writing within a period of time specified in the notice which is not later than 10 days from the date of sending the notice.

(d) (1) During a grantee's appeal of a termination decision, funding will continue until an adverse decision is rendered or until expiration of the then current budget period. At the end of the current budget period, if a decision has not been rendered, the responsible HHS official shall award an interim grant to the grantee until a decision is made.

(2) If a grantee's funding has been suspended, no funding shall be available during the termination proceedings, or at any other time, unless the action is rescinded or the grantee's appeal is successful. An interim grantee will be appointed during the appeal period.

(3) If a grantee does not appeal an administrative decision to court within 30 days of its receipt of the decision, a replacement grantee will be immediately sought. An interim grantee may be named, if needed, pending the selection of a replacement grantee.

(4) An interim grantee may be sought even though the grantee has appealed an administrative decision to court within 30 days, if the responsible HHS official determines it necessary to do so. Examples of circumstances that warrant an interim grantee are to protect children and families from harm and Federal funds from misuse or dissipation or both.

(e) If a grantee requests a hearing, it shall send a copy of its request to all delegate agencies which would be financially affected by the termination of assistance and to each delegate agency identified in the notice. The copies of the request shall be sent to these delegate agencies at the same time the grantee's request is made of ACYF. The grantee shall promptly send ACYF a list of the delegate agencies to which it has sent the copies and the date on which they were sent.

(f) If the Departmental Appeals Board informs a grantee that a proposed termination action has been set down for hearing, the grantee shall, within five days of its receipt of this notice, send a copy of it to all delegate agencies which would be financially affected by the termination and to each delegate agency identified in the notice. The grantee shall send the Departmental Appeals Board and the responsible HHS official a list of all delegate agencies notified and the dates of notification.

(g) If the responsible HHS official has initiated termination proceedings

because of the activities of a delegate agency, that delegate agency may participate in the hearing as a matter of right. Any other delegate agency, person, agency or organization that wishes to participate in the hearing may request permission to do so from the presiding officer of the hearing. Such participation shall not, without the consent of ACYF and the grantee, alter the time limitations for the delivery of papers or other procedures set forth in this section.

(h) The results of the proceeding and any measure taken thereafter by ACYF pursuant to this part shall be fully binding upon the grantee and all its delegate agencies, whether or not they actually participated in the hearing.

(i) A grantee may waive a hearing and submit written information and argument for the record. Such material shall be submitted within a reasonable period of time to be fixed by the Departmental Appeals Board upon the request of the grantee. The failure of a grantee to request a hearing, or to appear at a hearing for which a date had been set, unless excused for good cause, shall be deemed a waiver of the right to a hearing and consent to the making of a decision on the basis of written information and argument submitted by the parties to the Departmental Appeals Board.

(j) The responsible HHS official may attempt, either personally or through a representative, to resolve the issues in dispute by informal means prior to the hearing.

§ 1303.15 Appeal by a grantee from a denial of refunding.

(a) After receiving concurrence from the Commissioner, ACYF, a grantee's application for refunding may be denied by the responsible HHS official for circumstances described in paragraph (c) of this section.

(b) When an intention to deny a grantee's application for refunding is arrived at on a basis to which this subpart applies, the responsible HHS official will provide the grantee as much advance notice thereof as is reasonably possible, in no event later than 30 days after the receipt by ACYF of the application. The notice will inform the grantee that it has the opportunity for a full and fair hearing on whether refunding should be denied.

(1) Such appeals shall be governed by 45 CFR part 16, except as otherwise provided in the Head Start appeals regulations. Any grantee which requests a hearing shall be afforded one, as mandated by 42 U.S.C. 9841.

(2) Any such appeals must be filed within ten work days after the grantee

receives notice of the decision to deny refunding.

(c) Refunding of a grant may be denied for any or all of the reasons for which a grant may be terminated, as set forth in § 1303.14(b) of this part.

(d) Decisions to deny refunding shall be in writing, signed by the responsible HHS official, dated, and sent in compliance with § 1303.5 of this part or by telegram, or by any other mode establishing the date sent and received by the addressee, or the date it was determined delivery could not be made, or the date delivery was refused. A Notice of Decision shall contain:

(1) A statement that indicates the grounds which justify the proposed denial of refunding;

(2) The identity of the delegate agency, if the activities of that delegate agency are the basis, in whole or in part, for the proposed denial of refunding; and

(3) A statement that, if the grantee wishes to appeal the denial of refunding of financial assistance, it must appeal directly to the Departmental Appeals Board, and send a copy of the appeal to the responsible HHS official and the Commissioner, ACYF. Such an appeal must be in writing and it must fully set forth the grounds for the appeal and be accompanied by all documentation that the grantee believes is relevant and supportive of its position. Appeals will be governed by the Departmental Appeals Board's regulations at 45 CFR part 16, except as otherwise provided in the Head Start appeals regulations.

(e) The appeal may be made only by the Board of Directors of the grantee or by an official acting on behalf of such Board.

§ 1303.16 Conduct of hearing.

(a) The presiding officer shall conduct a full and fair hearing, avoid delay, maintain order, and make a sufficient record of the facts and issues. To accomplish these ends, the presiding officer shall have all powers authorized by law, and may make all procedural and evidentiary rulings necessary for the conduct of the hearing. The hearing shall be open to the public unless the presiding officer for good cause shown otherwise determines.

(b) Communications outside the record are prohibited as provided by 45 CFR 16.17.

(c) Both ACYF and the grantee are entitled to present their case by oral or documentary evidence, to submit rebuttal evidence and to conduct such examination and cross-examination as may be required for a full and true disclosure of all facts bearing on the issues. The issues shall be those stated

in the notice required to be filed by paragraph (g) of this section, those stipulated in a prehearing conference or those agreed to by the parties.

(d) In addition to ACYF, the grantee, and any delegate agencies which have a right to appear, the presiding officer may permit the participation in the proceedings of such persons or organizations as deemed necessary for a proper determination of the issues involved. Such participation may be limited to those issues or activities which the presiding officer believes will meet the needs of the proceeding, and may be limited to the filing of written material.

(e) Any person or organization that wishes to participate in a proceeding may apply for permission to do so from the presiding officer. This application, which shall be made as soon as possible after the notice of termination, denial of refunding or suspension has been received by the grantee, shall state the applicant's interest in the proceeding, the evidence or arguments the applicant intends to contribute, and the necessity for the introduction of such evidence or arguments.

(f) The presiding officer shall permit or deny such participation and shall give notice of his or her decision to the applicant, the grantee, and ACYF, and, in the case of denial, a brief statement of the reasons therefor. Even if previously denied, the presiding officer may subsequently permit such participation if, in his or her opinion, it is warranted by subsequent circumstances. If participation is granted, the presiding officer shall notify all parties of that fact and may, in appropriate cases, include in the notification a brief statement of the issues as to which participation is permitted.

(g) The Departmental Appeals Board will send the responsible HHS official, the grantee and any other party a notice which states the time, place, nature of the hearing, and the legal authority and jurisdiction under which the hearing is to be held. The notice will also identify with reasonable specificity and ACYF requirements which the grantee is alleged to have violated. The notice will be served and filed not later than ten work days prior to the hearing.

Subpart C—Appeals by Current or Prospective Delegate Agencies

§ 1303.20 Appeals to grantees by current or prospective delegate agencies of rejection of an application, failure to act on an application or termination of a grant or contract.

(a) A grantee must give prompt, fair and adequate consideration to

applications submitted by current or prospective delegate agencies to operate Head Start programs. The failure of the grantee to act within 30 days after receiving the application is deemed to be a rejection of the application.

(b) A grantee must notify an applicant in writing within 30 days after receiving the application of its decision to either accept or to wholly or substantially reject it. If the decision is to wholly or substantially reject the application, the notice shall contain a statement of the reasons for the decision and a statement that the applicant has a right to appeal the decision within ten work days after receipt of the notice. If a grantee fails to act on the application by the end of the 30 day period which grantees have to review applications, the current or prospective delegate agency may appeal to the grantee, in writing, within 15 work days of the end of the 30 day grantee review period.

(c) A grantee must notify a delegate agency in writing of its decision to terminate its agreement with the delegate agency, explaining the reasons for its decision and that the delegate agency has the right to appeal the decision to the grantee within ten work days after receipt of the notice.

(d) The grantee has 20 days to review the written appeal and issue its decision. If the grantee sustains its earlier termination of an award or its rejection of an application, the current or prospective delegate agency then may appeal, in writing, to the responsible HHS official. The appeal must be submitted to the responsible HHS official within ten work days after the receipt of the grantee's final decision. The appeal must fully set forth the grounds for the appeal.

(e) A grantee may not reject the application or terminate the operations of a delegate agency on the basis of defects or deficiencies in the application or in the operation of the program without first:

(1) Notifying the delegate agency of the defects and deficiencies;

(2) Providing, or providing for, technical assistance so that defects and deficiencies can be corrected by the delegate agency; and

(3) Giving the delegate agency the opportunity to make appropriate corrections.

(f) An appeal filed pursuant to a grantee failing to act on a current or prospective delegate agency's application within a 30 day period need only contain a copy of the application, the date filed, and any proof of the date the grantee received the application. The grantee shall have five days in which to respond to the appeal.

(g) Failure to appeal to the grantee regarding its decision to reject an application, terminate an agreement, or failure to act on an application shall bar any appeal to the responsible HHS official.

§ 1303.21 Procedures for appeal by current or prospective delegate agencies to the responsible HHS official from denials by grantees of an application or failure to act on an application.

(a) Any current or prospective delegate agency that is dissatisfied with the decision of a grantee rendered under § 1303.20 may appeal to the responsible HHS official whose decision is final and not appealable to the Commissioner, ACYF. Such an appeal must be in writing and it must fully set forth the grounds for the appeal and be accompanied by all documentation that the current or prospective delegate agency believes is relevant and supportive of this position, including all written material or documentation submitted to the grantee under the procedures set forth in § 1303.20, as well as a copy of any decision rendered by the grantee. A copy of the appeal and all material filed with the responsible HHS official must be simultaneously served on the grantee.

(b) In providing the information required by paragraph (a) of this section, delegate agencies must set forth:

(1) Whether, when and how the grantee advised the delegate agency of alleged defects and deficiencies in the delegate agency's application or in the operation of its program prior to the grantee's rejection or termination notice;

(2) Whether the grantee provided the delegate agency reasonable opportunity to correct the defects and deficiencies, the details of the opportunity that was given and whether or not the grantee provided or provided for technical advice, consultation, or assistance to the current delegate agency concerning the correction of the defects and deficiencies;

(3) What steps or measures, if any, were undertaken by the delegate agency to correct any defects or deficiencies;

(4) When and how the grantee notified the delegate agency of its decision;

(5) Whether the grantee told the delegate agency the reasons for its decision and, if so, how such reasons were communicated to the delegate agency and what they were;

(6) If it is the delegate agency's position that the grantee acted arbitrarily or capriciously, the reasons why the delegate agency takes this position; and

(7) Any other facts and circumstances which the delegate agency believes supports its appeal.

(c) The grantee may submit a written response to the appeal of a prospective delegate agency. It may also submit additional information which it believes is relevant and supportive of its position.

(d) In the case of an appeal by a delegate agency, the grantee must submit a written statement to the responsible HHS official responding to the items specified in paragraph (b) of this section. The grantee must include information that explains why it acted properly in arriving at its decision or in failing to act, and any other facts and circumstances which the grantee believes supports its position.

(e)(1) The responsible HHS official may meet informally with the current or prospective delegate agency if such official determines that such a meeting would be beneficial to the proper resolution of the appeal. Such meetings may be conducted by conference call.

(2) An informal meeting must be requested by the current or prospective delegate agency at the time of the appeal. In addition, the grantee may request an informal meeting with the responsible HHS official. If none of the parties requests an informal meeting, the responsible HHS official may hold such a meeting if he or she believes it would be beneficial for a proper resolution of the dispute. Both the grantee and the current or prospective delegate agency may attend any informal meeting concerning the appeal. If a party wishes to oppose a request for a meeting it must serve its opposition on the responsible HHS official and any other party within five work days of its receipt of the request.

(f) A grantee's response to appeals by current or prospective delegate agencies must be submitted to the responsible HHS official within ten work days of receipt of the materials served on it by the current or prospective delegate agency in accordance with paragraph (a) of this section. The grantee must serve a copy of its response on the current or prospective delegate agency.

(g) The responsible HHS official shall notify the current or prospective delegate agency and the grantee whether or not an informal meeting will be held. If an informal meeting is held, it must be held within ten work days after the notice by the responsible HHS official is mailed. The responsible HHS official must designate either the Regional Office or the place where the current or prospective delegate agency or grantee is located for holding the informal meeting.

(h) If an informal meeting is not held, each party shall have an opportunity to reply in writing to the written statement submitted by the other party. The written reply must be submitted to the responsible HHS official within five work days after the notification required by paragraph (g) of this section. If a meeting is not to be held, notice of that fact shall be served on the parties within five work days of the receipt of a timely response to such a request or the expiration of the time for submitting a response to such a request.

(i) In deciding an appeal under this section, the responsible HHS official will arrive at his or her decision by considering:

(1) The material submitted in writing and the information presented at any informal meeting;

(2) The application of the current or prospective delegate agency;

(3) His or her knowledge of the grantee's program as well as any evaluations of his or her staff about the grantee's program and current or prospective delegate agency's application and prior performance; and

(4) Any other evidence deemed relevant by the responsible HHS official.

§ 1303.22 Decision on appeal in favor of grantee.

(a) If the responsible HHS official finds in favor of the grantee, the appeal will be dismissed unless there is cause to remand the matter back to the grantee.

(b) The grantee's decision will be sustained unless it is determined by the responsible HHS official that the grantee acted arbitrarily, capriciously, or otherwise contrary to law, regulation, or other applicable requirements.

(c) The decision will be made within ten workdays after the informal meeting. The decision, including a statement of the reasons therefor, will be in writing, and will be served on the parties within five workdays from the date of the decision by the responsible HHS official.

(d) If the decision is made on the basis of written materials only, the decision will be made within five workdays of the receipt of the materials. The decision will be served on the parties no more than five days after it is made.

§ 1303.23 Decision on appeal in favor of the current or prospective delegate agency.

(a) The responsible HHS official will remand the rejection of an application or termination of an agreement to the grantee for prompt reconsideration and decision if the responsible HHS official's decision does not sustain the grantee's decision, and if there are issues which require further development before a final decision can be made. The grantee's reconsideration and decision must be made in accordance with all applicable requirements of this part as well as other relevant regulations, statutory provisions, and program issuances. The grantee must issue its decision on remand in writing to both the current or prospective delegate agency and the responsible HHS official within 15 workdays after the date of receipt of the remand.

(b) If the current or prospective delegate agency is dissatisfied with the grantee's decision on remand, it may appeal to the responsible HHS official within five workdays of its receipt of that decision. Any such appeal must

comply with the requirements of § 1303.21 of this part.

(c) If the responsible HHS official finds that the grantee's decision on remand is incorrect or if the grantee fails to issue its decision within 15 work days, the responsible HHS official will entertain an application by the current or prospective delegate agency for a direct grant.

(1) If such an application is approved, there will be a commensurate reduction in the level of funding of the grantee and whatever other action is deemed appropriate in the circumstances. Such reduction in funding shall not be considered a termination or denial of refunding and may not be appealed under this part.

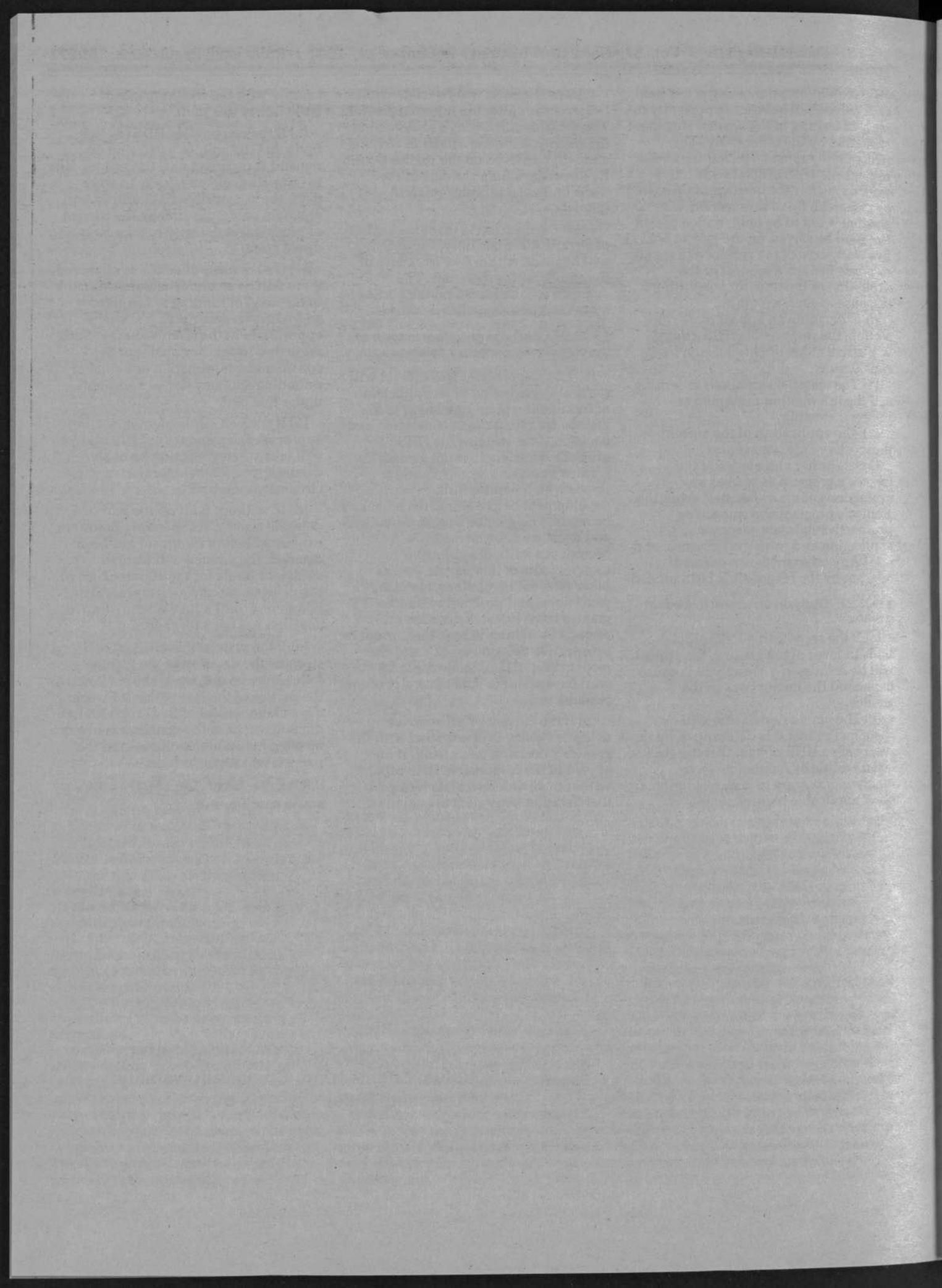
(2) If such an application is not approved, the responsible HHS official will take whatever action he or she deems appropriate under the circumstances.

(d) If, without fault on the part of a delegate agency, its operating funds are exhausted before its appeal has been decided, the grantee will furnish sufficient funds for the maintenance of the delegate agency's current level of operations until a final administrative decision has been reached.

(e) If the responsible HHS official sustains the decision of the grantee following remand, he or she shall notify the parties of the fact within 15 work days of the receipt of final submittal of documents, or of the conclusion of any meeting between the official and the parties, whichever is later.

[FR Doc. 92-29940 Filed 12-11-92; 8:45 am]

BILLING CODE 4130-01-M



48 CFR Part 48

Monday
December 14, 1992

Part V

**Department of
Defense**

**General Services
Administration**

**National Aeronautics
and Space
Administration**

48 CFR Part 48

**Federal Acquisition Regulation (FAR):
Value Engineering Costs Allowability;
Proposed Rules**

DEPARTMENT OF DEFENSE

GENERAL SERVICES
ADMINISTRATIONNATIONAL AERONAUTICS AND
SPACE ADMINISTRATION

48 CFR Part 48

RIN 9000-AD71

[FAR Case 89-88]

Federal Acquisition Regulation;
Allowability of Value Engineering
Costs

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed to republish the proposal to revise paragraph (b)(1) of FAR 48.101, General, to provide that under the incentive approach, the contractor develops and submits value engineering change proposals (VECP's) and shares in the savings of any that are accepted. The contract provides for payment of implementation costs if a VECP is accepted. The development costs for accepted and unaccepted VECP's shall be accumulated by VE project and charged indirectly if otherwise allowable in accordance with part 31.

DATES: Comments should be submitted to the FAR Secretariat at the address shown below on or before February 12, 1993, to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (VRS), ATTN: Deloris Baker, 18th & F Streets, NW., room 4041, Washington, DC 20405. Please cite FAR case 89-88 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT:

Ms. Linda Klein at (202) 501-3775 in reference to this FAR case. For general information, contact the FAR Secretariat, room 4041, GS Building, Washington, DC 20405, (202) 501-4755. Please cite FAR case 89-88.

SUPPLEMENTARY INFORMATION:

A. Background

This DARC-initiated revision was published as a proposed rule with a request for comments at 55 FR part 417, January 4, 1990. Thirty-three responses were received consisting of concurrences and no comments and 15 comments. Because of the complexity of the issues and questions that surfaced during the evaluation of the comments, revisions to the coverage were considered necessary. Since these changes may affect the public, it is considered necessary to republish the coverage as a proposed rule.

B. Regulatory Flexibility Act

The proposed rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because it is understood that most contractors already accumulate costs by value engineering project because they need this cost information to compute the projected savings and sharing arrangement on the VECP's submitted for approval. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. Comments from small entities concerning the affected FAR subpart will also be considered in accordance with section 610 of the Act. Such comments must be submitted separately and cite 5 U.S.C. 601, *et seq.* (FAR case 89-88), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose recordkeeping information collection requirements, or collections of information from offerors,

contractors, or members of the public which require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Part 48

Government procurement.

Dated: December 4, 1992.

Harry S. Rosinski,

Acting Director, Office of Federal Acquisition Policy.

Therefore, it is proposed that 48 CFR part 48 be amended as set forth below:

PART 48—VALUE ENGINEERING

1. The authority citation for 48 CFR part 48 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

2. Section 48.101 is amended by revising paragraph (b) introductory text and (b)(1) to read as follows:

48.101 General.

* * * * *

(b) There are two value engineering approaches, as follows:

(1) The first is an incentive approach in which contractor participation is voluntary. The contractor develops and submits value engineering change proposals (VECP's) and shares in the savings of any that are accepted. The contract provides for payment of implementation costs if a VECP is accepted. The development costs for accepted and unaccepted VECP's shall be accumulated by value engineering (VE) project and charged indirectly if otherwise allowable in accordance with part 31.

* * * * *

[FR Doc. 92-30241 Filed 12-11-92; 8:45 am]

BILLING CODE 6820-34-M